

No. 10933

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ETHEL STRICKLAND ROGAN, as Executrix of the
Last Will and Testament of Nat Rogan, Deceased,
Appellant,

vs.

FERNAND MERTENS, also known as FERNAND
GRAVET and VICTORINE CATHERINE RE-
NOURD MERTENS,
Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

MAR 21 1945

PAUL P. O'BRIEN,
CLERK

No. 10933

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ETHEL STRICKLAND ROGAN, as Executrix of the
Last Will and Testament of Nat Rogan, Deceased,
Appellant,

vs.

FERNAND MERTENS, also known as FERNAND
GRAVET and VICTORINE CATHERINE RE-
NOURD MERTENS,
Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division



INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Amended Complaint	2
Answer to Amended Complaint.....	10
Appeal:	
Notice of	34
Order Extending Time to Docket Cause on.....	35
Certificate of Clerk.....	36
Complaint, Amended	2
Answer to	10
Exhibits. [See Index to Exhibits.]	
Findings of Fact and Conclusions of Law.....	22
Judgment	32
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	34
Notice to Produce Under California C. C. P., Sec. 1938	15
Order Extending Time to Docket Cause on Appeal....	35
Order for Judgment.....	19

	Page
Reporter's Transcript	37
Testimony on Behalf of Plaintiffs:	
Levi, Leon—	
Direct Examination	192
Cross-Examination	202
Warren, George A.—	
Direct Examination	252
Cross-Examination	254
White, J. R.—	
Direct Examination	137
Direct Examination (recalled).....	223
Cross-Examination	225
Testimony on Behalf of Defendant:	
Givan, George W.—	
Direct Examination	276
Levi, Leon—	
Direct Examination	303
Direct Examination (recalled).....	328
Cross-Examination	332
Olson, May—	
Direct Examination	273
Cross-Examination	276
Warren, George A.—	
Direct Examination	306
White, J. R.—	
Direct Examination	278
Cross-Examination	291
Redirect Examination	292
Statement of Points Upon Which Appellant Intends to Rely	335

INDEX TO EXHIBITS.

	Page
Joint Exhibit 1. Stipulation	40
Plaintiffs' Exhibits:	
No.	
1. Letter Dated July 29, 1938, to Fernand Gravet	55
2. Letter Dated July 29, 1938, to Loew's, Incorporated	55
3. Photostatic Copy of Income Tax Return, Form 1040C, Filed June, 1938.....	63
4. Taxpayer's Copy of Income Tax Return, Form 1040C, Filed June, 1938.....	68
5. Photostatic Copy of Income Tax Return, Form 1040C, Filed September 7, 1938.....	72
6. Taxpayer's Copy of Income Tax Return, Form 1040C, Filed September 7, 1938.....	80
7. Original Copy of Income Tax Return, Form 1040C, Filed September 7, 1938.....	84
8. Taxpayer's Copy of Income Tax Return, Form 1040C, Filed September 7, 1938.....	88a
9. Photostatic Copy of Claim for Refund Filed by Mr. Mertens	90
10. Photostatic Copy of Claim for Refund Filed by Mrs. Mertens With Attached Schedule and Papers	103
11. Seven Letters	117
12. Two Letters	132
13. Taxpayer's Receipt for Income Tax for 1937..	142

PLAINTIFFS' EXHIBITS (Cont'd):	Page
15. Letter Dated September 16, 1940, From Internal Revenue Agent to Loew's, Inc.....	170
16. Letter Dated September 30, 1940, From Price-Waterhouse & Co. to Internal Revenue Agent..	174
17. Letter Dated October 22, 1940, From J. R. White to Internal Revenue Agent.....	178
18. Letter Dated September 8, 1938, From Price-Waterhouse & Co. to Loew's, Inc.....	185
19. The Mertens Tax Calculations.....	190
20. Original LeRoy Contract.....	230
21. Proposed Contract Between Loew's, Inc. and Fernand Gravet	230
22. Ledger Sheet	254
23. Original Assessment List	261
24. Original Assessment List	265

Defendant's Exhibits:

No.

A. Letter Dated September 8, 1938, From Loew's, Inc. to Fernand Gravet.....	209
B. Substitution of Attorney in Fact.....	218
C. Substitution of Attorney in Fact.....	220
G. Two Telegrams	271
H. Letter Dated April 26, 1939, From Loew's, Inc. to Price-Waterhouse & Co.	284
I. Letter Dated March 4, 1940, From Price-Waterhouse & Co. to Mr. Mertens.....	286
J. Copy of Data Presented to Collector's Office About August 25, 1938.....	293

DEFENDANT'S EXHIBITS (Cont'd):	Page
K. Alien Income Tax Return of Mr. and Mrs. Gravet, Period Beginning January 1, 1937, and Ending January 31, 1937.....	299
L. Nonresident Alien Income Tax Return of Mrs. Mertens for Period Beginning January 1, 1937, Ending November 30, 1937.....	300
M. Income Tax Return for 1937.....	302
N. Income Tax Return for 1936.....	302
O. Copy of Claim for Refund for Income Tax for 1936	303
P. Commissioner's Certified Copy of the Bureau's Certificate of Over-Assessment.....	303
Q. Letter Dated September 13, 1938, From Fernand Gravet to Loew's, Inc.....	308
R. Letter Dated July 29, 1938, From Mervyn LeRoy to Loew's, Inc.	313
S. Letter Dated July 27, 1938, From Price-Waterhouse & Co. to Loew's, Inc.....	316
T. Letter Dated August 12, 1938, From Price-Waterhouse & Co. to Loew's, Inc.....	318
U. Summary of Cancelled Checks.....	322
V. Cancelled Check of Loew's, Inc., Payable to the Bank of America.....	324

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

CHARLES H. CARR,
United States Attorney

E. H. MITCHELL
Assistant United States Attorney

WALTER S. BINNS,
Assistant United States Attorney

EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue
Federal Building,
Los Angeles, California

For Appellee:

LOEB AND LOEB

GEORGE H. ZEUTZIUS,

HERMAN D. GREENSCHLAG

523 West Sixth Street
Los Angeles, California [1*]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 3002-Y Civ.

FERNAND MERTENS, also known as FERNAND
GRAVET, and VICTORINE CATHERINE RE-
NOURD MERTENS,

Plaintiffs,

vs.

ETHEL STRICKLAND ROGAN, as Executrix of the
Last Will and Testament of Nat Rogan, Deceased,
Defendant

AMENDED COMPLAINT

(For Refund of Income Tax)

Plaintiffs complain of the above named defendant, as executrix of the Last Will and Testament of Nat Rogan, deceased, and alleges as follows:

I.

On or about August 8, 1943, Nat Rogan died testate, and thereafter, on or about October 8, 1943, by an order duly made and entered in the Superior Court of the State of California in and for the County of San Diego, Ethel Strickland Rogan was appointed executrix of the Last Will and Testament of said Nat Rogan, deceased, and thereafter, on or about October 8, 1943, she duly qualified as such executrix and letters testamentary were thereupon duly issued to her out of said Court, and she has ever since been [2] and now is the duly appointed, qualified and acting executrix of the Last Will and Testament of said Nat Rogan, deceased.

II.

During the year 1938 and at all times subsequent thereto up to June 30, 1943, and at the date of the filing of the Complaint herein, said Nat Rogan was the duly appointed, qualified and acting Collector of Internal Revenue for the Sixth Collection District, California.

III.

Plaintiffs are and at all times herein mentioned were husband and wife, plaintiff Fernand Mertens, also known as Fernand Gravet, is now and at all times herein mentioned was, a citizen of the Kingdom of Belgium; plaintiff Victorine Catherine Renourd Mertens is now and at all times herein mentioned was, a citizen of the Republic of France; plaintiffs were at all times herein mentioned during the year 1938 residents of the County of Los Angeles, in the Southern District of California, Central Division; plaintiffs are now residents of Paris, France.

IV.

During the year 1938 plaintiff Fernand Mertens, also known as Fernand Gravet, rendered services as an actor for Warner Bros. Pictures, Inc. in said County of Los Angeles, in the Southern District of California, Central Division, and said Warner Bros. Pictures, Inc., during said year 1938, paid to or for the benefit of said Fernand Mertens, also known as Fernand Gravet, for said services the sum of \$10,204.09.

V.

During the year 1938 plaintiff Fernand Mertens, also known as Fernand Gravet, rendered services as an actor for Loew's Incorporated, pursuant to the terms of the written contract [3] dated July 29, 1938, and in accordance with the terms of said contract Loew's Incorporated, during said year 1938, paid to or for the benefit of said

Fernand Mertens, also known as Fernand Gravet, for said services the sum of \$121,242.30.

VI.

All of the moneys paid to or for the benefit of plaintiff Fernand Mertens, also known as Fernand Gravet, as in paragraphs IV and V above set forth, was community income of plaintiffs herein.

VII.

Said contract of July 29, 1938 further provided that said Loew's Incorporated agreed to pay all taxes which might lawfully be assessed against plaintiff Fernand Mertens, also known as Fernand Gravet, in the United States to the extent that such taxes were based upon sums derived by plaintiff Fernand Mertens, also known as Fernand Gravet, from his services performed under said contract.

VIII.

In June 1938 plaintiff Victorine Catherine Renourd Mertens desired to depart from the United States of America and it became necessary, under the provisions of the Revenue Act of 1938, for her to obtain a certificate of compliance from said Nat Rogan as Collector of Internal Revenue as aforesaid; before issuing said certificate said Nat Rogan, as Collector of Internal Revenue as aforesaid, computed a tentative federal income tax liability in respect to plaintiff Victorine Catherine Renourd Mertens for one-half of the community income of plaintiffs earned up to May 31, 1938; that said Nat Rogan, as Collector of Internal Revenue as aforesaid, estimated

said tentative liability to be \$3,249.92 and before issuing said certificate of compliance demanded payment of said sum, which sum plaintiff Victorine Catherine [4] Renourd Mertens paid to him on the 21st day of June, 1938.

IX.

In September 1938 plaintiff Fernand Mertens, also known as Fernand Gravet, desired to depart from the United States of America, and it became necessary, under the provisions of the Revenue Act of 1938, for him to obtain a certificate of compliance from said Nat Rogan, as Collector of Internal Revenue as aforesaid.

X.

On September 6, 1938, said Nat Rogan, as Collector of Internal Revenue as aforesaid, recomputed the tentative federal income tax liability of plaintiff Victorine Catherine Renourd Mertens in respect to one-half of the community income of plaintiffs earned prior to September 1, 1938 and estimated said liability to be \$20,669.80.

XI.

On September 6, 1938, said Nat Rogan, as Collector of Internal Revenue as aforesaid, computed the tentative federal income tax liability of plaintiff Fernand Mertens, also known as Fernand Gravet, in respect to one-half of the community income of plaintiffs earned prior to September 1, 1938, and estimated said liability to be \$20,669.80.

XII.

On September 6, 1938, the Commissioner of Internal Revenue gave notice to each of the plaintiffs of the ter-

mination of their respective taxable periods as of September 1, 1938 and demanded of each payment of the tax claimed due from each for said taxable periods.

XIII.

Before issuing a certificate of compliance to plaintiff Fernand Mertens, also known as Fernand Gravet, and in [5] September 1938, said Nat Rogan, as Collector of Internal Revenue as aforesaid, demanded of him the payment of the sum of \$37,073.27; that said sum was the balance of the tentative liability of plaintiff Victorine Catherine Renourd Mertens after payment to said Nat Rogan, as Collector of Internal Revenue as aforesaid, of the sum of \$3,249.92 on June 21, 1938, as in paragraph VIII set forth, plus the balance of the tentative liability of plaintiff Fernand Mertens, also known as Fernand Gravet, after the withholding and payment to said Nat Rogan, as Collector of Internal Revenue as aforesaid, by said Warner Bros. Pictures, Inc. of the sum of \$1,020.41; that in compliance with said demand, plaintiffs paid to said Nat Rogan, as Collector of Internal Revenue as aforesaid, said sum of \$37,073.27 on the 7th day of September, 1938.

XIV.

In computing the tentative tax liability of each plaintiff herein, said Nat Rogan, as Collector of Internal Revenue as aforesaid, wrongfully included in their community income the sum of \$40,017.41 upon the ground that said sum had been constructively received by plaintiffs from Loew's Incorporated in the year 1938; that

this amount represented the estimate of said Nat Rogan, as Collector of Internal Revenue as aforesaid, of the amount payable by said Loew's Incorporated to plaintiffs as reimbursement for federal income taxes under the provisions of said contract mentioned in paragraph VII.

XV.

In order to obtain funds to pay the various demands of said Nat Rogan, as Collector of Internal Revenue as aforesaid, plaintiffs borrowed from Loew's Incorporated the sum of \$3,245.92 on June 21, 1938, and the further sum of \$37,073.27 on September 7, 1938; that said amounts represented loans and were [6] not payments under the provisions of said contract dated July 29, 1938; that by the provisions of said contract the liability of Loew's Incorporated referred to in paragraph VII hereof, did not mature or become payable until after the end of the year 1938, at which time plaintiffs' tax liability for the year 1938 first became determinable.

XVI.

In the year 1939 plaintiffs filed with said Nat Rogan, as Collector of Internal Revenue as aforesaid, separate federal income tax returns for the year 1938; that for the year 1938 plaintiff Fernand Mertens, also known as Fernand Gravet, had a gross taxable income of \$57,574.70 and a net taxable income of \$56,867.59 and said plaintiff included said amounts in his said return; that for the year 1938 plaintiff Victorine Catherine Renourd Mertens had a gross taxable income of \$57,574.70 and a net taxable income of \$56,867.59 and said plaintiff included said amounts in her said return.

XVII.

Under the provisions of the Revenue Act of 1938 the federal income tax liability of plaintiff Fernand Mertens, also known as Fernand Gravet, was \$11,470.15 and no more.

XVIII.

Under the provisions of the Revenue Act of 1938 the federal income tax liability of plaintiff Victorine Catherine Renourd Mertens was \$11,470.15 and no more.

XIX.

On March 4, 1940 plaintiff Fernand Mertens, also known as Fernand Gravet, duly filed with the Commissioner of Internal Revenue, through said Nat Rogan, as Collector of Internal Revenue as aforesaid, his sworn claim for a refund of the sum of \$9,199.65, the amount of the overpayment by him of his said [7] federal income tax liability for the year 1938; on March 4, 1940, plaintiff Victorine Catherine Renourd Mertens duly filed with the Commissioner of Internal Revenue, through said Nat Rogan, as Collector of Internal Revenue as aforesaid, her sworn claim for a refund of the sum of \$9,199.65, the amount of the overpayment by her of her said federal income tax liability for the year 1938.

XX.

On July 14, 1941, the Commissioner of Internal Revenue disallowed and rejected the said claim of plaintiff Fernand Mertens, also known as Fernand Gravet, and the said claim of plaintiff Victorine Catherine Renourd Mertens.

Wherefore, plaintiff Fernand Mertens, also known as Fernand Gravet, prays for judgment against defendant in the sum of \$9,199.65, together with interest thereon at the rate of six per cent per annum from the 7th day of September, 1938 and for his costs of action, and plaintiff Victorine Catherine Renourd Mertens prays for judgment against defendant in the sum of \$9,199.65, together with interest thereon at the rate of six per cent per annum from the 7th day of September, 1938, and for her costs of action, and plaintiffs further pray for such further and other relief as to this court may seem fit and proper in the premises.

LOEB AND LOEB

By Dwight W. Stephenson

Dwight W. Stephenson

523 West Sixth Street. Los Angeles

Attorneys for Plaintiffs

Dwight W. Stephenson

523 West Sixth Street

Los Angeles, California

Of counsel. [8]

[Verified.]

[Endorsed]: Filed Oct. 28, 1943. [9]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the defendant in the above-entitled action and, in answer to plaintiff's Amended Complaint, admits, denies and alleges:

I.

Admits the allegations contained in Paragraphs I and II thereof.

II.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs III, IV, V, VI and VII thereof.

III.

Admits the allegations contained in Paragraph VIII thereof, except that the defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiffs received any community income in 1938, or as to the truth of the allegation that plaintiffs received any community income in 1938, or as to the truth of the allegation that the plaintiff, Victorine Catherine [10] Mertens, paid to the said Collector the sum of \$3,249.92 or any other amount on the date alleged, or on any other day. Defendant admits, however, that said sum was paid on said date.

IV.

Admits the allegations contained in Paragraphs IX, X, XI and XII thereof, except that defendant is without knowledge or information sufficient to form a belief

as to the truth of the allegations contained in Paragraphs X and XI to the effect that the income referred to was community income.

V.

Admits the allegations contained in Paragraph XIII, except that defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiffs or either of them paid to the said Collector the sum of \$37,073.27 or any other sum on the date alleged or on any other date. Defendant admits, however, that said sum was paid on said date.

VI.

Denies the allegations contained in Paragraph XIV thereof, except that defendant admits that Nat Rogan, as Collector of Internal Revenue, included in the plaintiffs' income an estimate of the amount payable by Loew's In-

[LRY J] in respect of
corporated to the plaintiff, Fernand Mertens, as re-
~~imbursement~~ for Federal income taxes.

VII.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XV thereof.

VIII.

Denies the allegations contained in Paragraphs XVI, XVII and XVIII thereof.

IX.

Admits the allegations contained in Paragraph XIX thereof, except that defendant denies that there was an

overpayment of tax by the plaintiffs or either of them for the year 1938 or any other year.

X.

Admits the allegations contained in Paragraph XX thereof, except that the Commissioner of Internal Revenue disallowed and rejected the said claim on July [11] 11, 1941, instead of July 14, 1941.

As a Second, Alternative and Separate Defense to plaintiffs' cause of action, defendant alleges:

XI.

Defendant is informed and believes and upon such information and belief alleges that the plaintiffs were not domiciled in the State of California during the year 1938 or at any other time.

XII.

The defendant is informed and believes and on that ground alleges that the earnings of the plaintiff, Fernand Mertens, during the year 1938 and/or the year 1939 were his separate property and were not the community property of the plaintiffs.

XIII.

On the same ground defendant alleges that the moneys with which were paid the alleged income taxes of the plaintiff, Victorine Catherine Renourd Mertens, were the separate property of the plaintiff Fernand Mertens, and never belonged to his wife.

XIV.

On the same ground defendant alleges that one-half of the questioned earnings of the plaintiff, Fernand Mer-

tens, was reported by him and/or his agents as the income of his said wife, for the purpose of reducing his Federal income taxes.

XV.

Regardless of when or in what year the questioned earnings of Fernand Mertens were realized as taxable income, the Federal taxes upon all thereof should be correctly computed as the taxes of Fernand Mertens. In determining the amount of any overpayment in favor of Fernand Mertens, his total taxes for the year or years involved should be credited not only with payments actually made to the Collector in his own name, but also with those made by him or his agents which were purported to have been made for, in behalf and in the name of his wife. [12]

The plaintiff, Victorine Catherine Renourd Mertens, made no overpayment of taxes, and in equity and good conscience is not entitled to a refund in any amount.

As a Third and Separate Defense, defendant alleges:

XVI.

Whether the moneys paid as taxes to the Collector, the recovery of which is here sought, were community property or were the separate property of the plaintiff, Fernand Mertens, the complaint fails to state a claim upon which relief can be granted to the plaintiff, Victorine Catherine Renourd Mertens.

As a Fourth and Separate Defense, defendant alleges:

XVII.

Insofar as the recovery of community moneys wrongfully withheld or of separate moneys of plaintiff, Fernand Mertens, wrongfully withheld, is sought by this action, the plaintiff, Victorine Catherine Renourd Mertens, is not a real party in interest and is not a proper party to the action.

Wherefore, having fully answered, defendant prays that plaintiffs take nothing by their amended complaint, and that the defendant be dismissed with her costs in this behalf expended.

CHARLES H. CARR

United States Attorney

E. H. MITCHELL

Assistant United States Attorney

WALTER S. BINNS

Assistant United States Attorney

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue

By Walter S. Binns

Attorneys for Defendant

[Endorsed]: Filed Dec. 4, 1943. [13]

[Title of District Court and Cause.]

NOTICE TO PRODUCE UNDER CALIFORNIA
C. C. P. §1938

To the Above-Named Plaintiffs, and Each of Them, and
to Loeb and Loeb, Their Attorneys:

You and Each of You are hereby requested to produce
at the trial of the above-entitled action:

1. The plaintiffs' retained copies of the following
United States Departing Aliens Income Tax Returns
(Form 1040C):—

(a) of Fernand Mertens (Fernand Gravet), Ac-
tor, verified September 6, 1938, and filed in the Office
of the Collector of Internal Revenue at Los Angeles,
California, on the 7th day of September, 1938, to-
gether with all instruments and documents and
schedules filed concurrently therewith or thereto at-
tached;

(b) of Victorine Martens (Mrs. Fernand Gravet).
verified September 6, 1938, and filed in the Office of
the Collector of Internal Revenue at Los Angeles,
California, on the 7th day of [14] September, 1938,
together with all instruments and documents and
schedules filed concurrently therewith or thereto at-
tached; and

(c) of Victorine Mertens (Mrs. Fernand Gravet),
verified June 21, 1938, and filed in the Office of the
Collector of Internal Revenue at Los Angeles, Cali-
fornia, on the 21st day of June, 1938, together with
all instruments and documents and schedules filed
concurrently therewith or thereto attached.

2. The plaintiffs' retained copies of all other income
tax returns ever filed by the plaintiffs, or either of them,
since the 1st day of January, 1938.

3. All of plaintiffs' working notes and other data used by them or their agents in preparing all of the returns referred to in Items 1 and 2, above.

4. Plaintiffs' retained office copies of all letters and other written communications addressed and sent or delivered to Loew's Incorporated, its agents and representatives, after January 1, 1938, relating to the latter's 1938 employment of the plaintiff, Fernand Mertens, in connection with the production of the photoplay known as "The Great Waltz," and relating to any moneys received or to be received by either plaintiff for the rendition of services by said Fernand Mertens in the production of said photoplay.

5. All original letters and other written communications received by either plaintiff, their agents or representatives, from Loew's Incorporated, its agents and representatives, subsequent to January 1, 1938, and relating to the services referred to in the last Item, numbered 4, above, relating to any and all compensation received and to be received by the plaintiff, Fernand Mertens (Gravet) for such services, and relating to the latter's contract of employment by Loew's Incorporated and/or the terms thereof.

6. All retained copies of all powers of attorney and all other written authorizations addressed by the plaintiffs or either of them to Price Waterhouse and Company, J. R. White, a member of said Company, and to any other person, firm or corporation, the originals of which were sent or delivered to such addressees between January 1, 1938, and the present time, employing and/or authorizing such addressees or any of them to act for the plaintiffs or either of them, [15]

(1st) in the matter of plaintiffs' Federal income taxes for the year 1938, for all subsequent years, and for all fractional portions of said years,

(2d) in the matter of the compensation received and/or to be received by the plaintiff, Fernand Mertens (Gravet) from Loew's Incorporated for services rendered by him in 1938 in the making of the photoplay, "The Great Waltz," and

(3d) in the matter of the prosecution of any refund claims of the plaintiffs of any alleged overpayment or overpayments of Federal income taxes covering the taxable year 1938 and any other taxable year or any taxable period in said years less than a full calendar year.

7. All retained copies of any and all letters and other written communications, the originals of which were signed by the plaintiffs or either of them and sent or delivered to Loew's Incorporated, its agents or representatives, subsequent to January 1, 1938, relating to a purported loan of money by Loew's Incorporated to the plaintiff, Fernand Mertens, on or about the month of September, 1938, and relating to the time or times for the repayment of said purported loan or any part thereof.

8. All original letters and other written communications from Loew's Incorporated, its agents and representatives, addressed to and received by the plaintiffs, or either of them, their agents and representatives, subsequent to January 1, 1938, relating to such purported loan and to the time or times for its repayment or for the repayment of any part thereof.

9. The original contract of employment, dated and entered into on or about the 29th day of July, 1938, between Loew's Incorporated and the plaintiff, Fernand Mertens, also known as Fernand Gravet, relating to

services rendered and/or to be rendered by said plaintiff in connection with the production of the photoplay known as "The Great Waltz."

10. The original of that certain two-page letter dated Culver City, California, July 29, 1938, purporting to be signed by Fernand Gravet, addressed to Loew's Incorporated, Culver City, California, purporting to commence with the [16] words "Concurrently herewith I have entered into an agreement with you covering, among other things, certain terms of my employment in connection with the Photoplay now entitled 'The Great Waltz,' " purporting to end with the words "If the foregoing is in accordance with your understanding and agreement, kindly indicate your approval and acceptance thereof in the space hereinbelow provided," and in the lower left hand corner of page two of which there purports to be an approval and acceptance bearing the signature of Loew's Incorporated, signed on its behalf by Benjamin Thau, Assistant Secretary.

11. All canceled checks drawn by the plaintiffs, or either of them, their agents and representatives, in the year 1938, payable to any and all United States Collectors of Internal Revenue, and evidencing the payment of Federal taxes and purported taxes upon income received, or claimed to have been received by the plaintiffs or either of them, in the year 1938.

Dated this 23d day of March, 1944.

CHARLES H. CARR

United States Attorney

E. H. MITCHELL

Assistant United States Attorney

By E. H. Mitchell

Attorneys for Defendant

[Endorsed]: Filed Mar. 23, 1944. [17]

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

Appearances:

For the Plaintiffs: LOEB & LOEB
GEORGE H. ZEUTZIUS
Los Angeles, California

For the Defendant: CHARLES H. CARR
United States Attorney
EDWARD H. MITCHELL
Assistant U. S. Attorney
Los Angeles, California [18]

The above-entitled cause heretofore tried, argued and submitted, is now decided as follows:

That plaintiff, Fernand Mertens, also known as Fernand Gravet, do have judgment against the defendant in the sum of \$9199.65, together with interest thereon at the rate of six per cent per annum from the 7th day of September, 1938; and that plaintiff, Victorine Catherine Renourd Mertens, do have judgment against the defendant in the sum of \$9199.65, together with interest thereon at the rate of six per cent per annum from the 7th day of September, 1938, after reducing, as to each of said plaintiffs, each of said sum so as to limit the refund to the basis of the returns. The computation to be made in accordance with the facts in the case and the rules of this court.

Costs to the plaintiffs.

The Court makes the following findings on the facts involved:

At the time of the payment of the tax on September 7, 1938, the plaintiffs were husband and wife, married

under the law of France, and were resident aliens of the United States.

The income on which the tax sought to be recovered was computed was community property of the plaintiffs.

When the plaintiff, Victorine Catherine Renourd Mertens, departed from the United States in June, 1938, and when the plaintiff, Fernand Mertens, departed from the United States in September, 1938, they did not intend to, and did not surrender, their status as resident aliens, but, on the contrary, they intended to return to the United States.

The taxes sought to be recovered were paid under the provisions of the Revenue Act of 1938, in order to obtain a Certificate of Compliance from the Collector of [19] Internal Revenue, prior to departure from the United States.

In computing the tentative tax liability of each plaintiff herein, Nat Rogan, as Collector of Internal Revenue, wrongfully included in their community property income the sum of \$40,017.41, as income "constructively received" from Loew's Inc., in the year 1938. This for the reason that the evidence shows, not only by a preponderance thereof, but without contradiction, that whatever understandings Fernand Mertens had with Loew's Inc. in regard to the payment of the tax on the income, was changed, when in the face of the erroneous demand of the Collector, the parties to the two agreements of July 29, 1938, (Exhibits 1 and 2) substituted a new agreement whereby it was agreed that Loew's Inc. should advance the tax demanded as a loan, to be adjusted later on when the full tax liability had actually been determined. This could not be done until after the taxable year had ended. All the contemporary conversations, in-

cluding those had in the presence of the representatives of the Internal Revenue Bureau, all the documentary evidence, including the books of account of Loew's Inc., show that the loan arrangement was not a mere book-keeping matter, resorted to with the view of avoiding the tax, but a new arrangement brought on by the erroneous demand of the Internal Revenue Collector.

To treat such a loan as income would require us to disregard unchallenged facts and acts, the good faith of which has not been impugned by the Government, and to substitute therefor highly speculative considerations, which,—despite the good faith of the collector and those who, with the best of motives, now seek to sustain his view—find no support in the record.

I am also of opinion that because the taxpayer did not file within the time required by law, or any legal extension thereof, a full return for the taxable year involved, [20] his recovery should be on the basis of the partial returns on which the tax was paid, rather than on the refund schedules filed later, which claimed deductions for the remainder of the taxable year. The schedules attached to the refund claim cannot take the place of the complete and full return which was never filed.

Hence the ruling above made.

Formal findings and judgment to follow.

Dated this 20th day of April, 1944.

LEON R. YANKWICH

Judge

[Endorsed]: Filed Apr. 20, 1944. [21]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled case came on regularly for trial without a jury, on March 28, 1944, before the above entitled Court, the Honorable Leon R. Yankwich presiding, plaintiffs appearing by their attorneys Loeb and Loeb by George H. Zeutzius and Herman D. Greenschlag, and defendant appearing by Charles H. Carr, United States Attorney, by Edward H. Mitchell, Assistant United States Attorney. Evidence, oral and documentary, and by stipulation of certain of the facts, having been received, the cause having been submitted, the Court having considered the evidence and argument of counsel and having filed its opinion herein on April 20, 1944 ordering judgments for plaintiffs, makes the following:

Findings of Fact

1. This action is for the refund of \$18,399.30, of which each plaintiff claims \$9,199.65, as overpayments of individual [22] income taxes for 1938, plus interest thereon from the date of payment, September 7, 1938.

2. Plaintiffs, Fernand Mertens, known also as Fernand Gravet, and Victorine Catherine Renourd Mertens are and, at all material times were, husband and wife, married under the law of France, and as such husband and wife were resident aliens of the United States during all of 1938, and resided in Los Angeles County. Plaintiffs were in the United States under quota numbers.

3. During all of 1938 and thereafter until his resignation on June 30, 1943, Nat Rogan was the duly appointed, qualified and acting Collector of Internal Revenue

for the Sixth Collection District of the State of California.

4. On August 8, 1943, said Nat Rogan died, testate, and on October 8, 1943, the defendant, Ethel Strickland Rogan, his widow, was by order of the Superior Court of the State of California, in and for the County of San Diego, duly appointed Executrix of the last will and testament of said Nat Rogan, and on said date she duly qualified as such Executrix. Letters testamentary were thereupon issued to her out of said court and she has been ever since and now is the duly appointed, qualified and acting Executrix under said decedent's will.

5. An amended complaint was filed herein on October 28, 1943, in which the aforesaid Executrix, as executrix of the said deceased Collector, was duly substituted and served as defendant herein.

6. During 1938 and prior to July 29 of said year, plaintiff Fernand Mertens rendered services as an actor for Warner Bros. Pictures, Inc., in Los Angeles County, California, and said Warner Bros. Pictures, Inc., during 1938 and prior to September 1 of said year, paid to or for the benefit of Mertens for said services \$10,204.09, which item of gross income is not in dispute.

7. During 1938 and prior to September 14 of said year, plaintiff Fernand Mertens also rendered services as an actor for [23] Loew's Incorporated, at Los Angeles, pursuant to the terms of a written agreement dated July 29, 1938, for the making of a photoplay called "The Great Waltz." In accordance with the terms of said agreement, Loew's Incorporated during 1938 and on and prior to September 14, 1938 of said year, paid Fernand Mertens compensation for said services in the total sum of \$120,000.00.

8. The total combined net incomes of plaintiffs derived by them from all sources within and without the United States for the period January 1, 1938 to and including September 14, 1938 was \$114,832.80, but for the period January 1, 1938 to and including December 31, 1938 it was \$113,735.17. All of said net income was community property income of the plaintiffs.

9. On June 21, 1938 the plaintiff Victorine Catherine Renourd Mertens, desiring to go to France, went to the office of Collector of Internal Revenue, Nat Rogan, at Los Angeles, for the purpose of obtaining a Certificate of Compliance with the Internal Revenue Laws. Said Collector required her to file on said date, as a resident alien, a departing alien income tax return, on Treasury Department Form 1040C, and to report therein her one-half of the community income of herself and plaintiff husband for the period January 1, 1938 to and including June 30, 1938. She paid to said Collector the tentative tax computed by him and demanded thereon of \$3,245.92 with funds loaned by Loew's Incorporated and duly recorded on the latter's books as a loan. Said plaintiff wife thereafter, on June 30, 1938, departed the United States for Paris, France, of which country she was a citizen, When she departed she did not intend to, and did not then, or during 1938, surrender her *her* status as a resident alien but intended to return to the United States.

10. On or before August 30, 1938, plaintiff Fernand Mertens advised said Collector that he intended to depart the United States for Paris, France, on or about September 14, 1938, and desired to [24] obtain the necessary Certificate of Compliance with the Internal Revenue laws of the United States. Before issuing said Certificate, the Collector recomputed the tentative federal income tax liability of plaintiff Victorine Catherine Renourd Mertens

in respect to one-half of the community property incomes of plaintiffs earned between January 1, 1938 and September 14, 1938, inclusive, and estimated her said tax liability for said period to be \$20,669.80. A similar computation of tentative tax liability was made in the amount of \$20,669.80 by said Collector for Plaintiff Fernand Mertens with respect to his half of said community. In making said computations the Collector included in plaintiffs' community property incomes, over the latters' protest, the total sum of \$40,017.41, as his estimate of the amount to be payable by Loew's Incorporated on the theory it would be income "constructively received" from Loew's Incorporated, in 1938.

11. Said sum of \$40,017.41, referred to in the immediately preceding paragraph was algebraically computed and built up by pyramiding taxes under the Collector's said theory that such amount represented the liability of Loew's Incorporated under an agreement dated July 29, 1938, whereunder Loew's had agreed "to pay all taxes which may lawfully be assessed against me (Mertens) in the United States, but only to the extent that such taxes are based upon sums derived by me from my services in connection with said photoplay now entitled 'The Great Waltz.'" By the employment agreement dated July 29, 1938, referred to in paragraph 7 hereof, it was provided that the total compensation to be paid to Mertens for all of his services in said photoplay "shall be \$120,000."

12. The correct amount of tax on said community income of \$120,000 and all other income from all other sources, none of which is in dispute, after proper deductions, was and is \$11,867.40 for each plaintiff, or a total combined sum of \$23,734.80 for the period January 1 to September 14, 1938. The correct amount of tax at-

trib- [25] utable solely to the compensation from Loew's Incorporated, after proper deductions, was even less. When plaintiff and Loew's Incorporated, on or before August 30, 1938 were advised by the Collector that the aggregate taxes would be computed and payment would be demanded in an amount in excess of \$40,000, based upon the Collector's insistence that an amount of \$40,017.41 would have to be added to income before any Certificate of Compliance would be issued, the parties to said agreements of July 29, 1938 promptly substituted a new agreement whereby it was agreed that Loew's Incorporated should advance the amount which was going to be demanded by the Collector as a loan, to be adjusted later on when the full tax liability had actually been determined and ascertained. This could not be done until after the taxable year had ended.

13. On September 7, 1938, the Collector prepared on Treasury Department Forms 1040C, departing alien income tax returns, one for each of the plaintiffs, for the period January 1, 1938 to September 1938, and included therein, in addition to the sum of \$40,017.41 estimated to be an amount "constructively received" from Loew's, all income derived by plaintiffs from all sources within and without the United States during the period January 1, 1938 through September 14, 1938, resulting in an aggregate claimed net income of \$154,850.21, of which one-half or \$77,425.10 was included in each return. The total tax liability shown on each return was \$20,669.80. The total tax for both parties was shown as \$41,339.60, of which \$301.78 represented the total tax attributable to plaintiffs' French community property incomes. After deducting \$1,020.41 representing tax withheld and paid by Warner Brothers, there remained a combined tax balance of \$40,017.41, which was also the exact amount

which the Collector included in plaintiffs' community incomes as "constructively received" from Loew's Incorporated. [26]

14. Plaintiff Fernand Mertens, under a power of attorney from his wife, was required to and did execute before and file with said Collector the aforesaid return prepared for his wife. He also executed and filed the return prepared by said Collector for him. These returns were prepared, executed and filed on September 7, 1938, at which time the amounts of \$19,649.39 and \$17,423.88 were paid to the Collector by plaintiffs, and these amounts, together with the amount hereinabove shown previously to have been paid or withheld aggregated \$20,669.80 and \$20,669.80 respectively. Thereupon, Certificates of Compliance with the Internal Revenue laws were issued to plaintiffs as of September 7, 1938. Plaintiff Fernand Mertens thereafter, on or about September 15, 1938, departed the United States for Paris, France. When he departed he did not intend to, nor did he then, or during 1938, surrender his status as a resident alien but intended to return to the United States.

15. Plaintiffs were on the cash receipts and disbursements basis of accounting and filed their returns on such basis. The taxes demanded and paid by plaintiffs based on their returns filed September 7, 1938 were not assessed by the Commissioner of Internal Revenue until October 17, 1938 and the tentative tax paid by Mrs. Mertens based on the June return was assessed on November 4, 1938.

16. In order to make the aforesaid tax payments on September 7, 1938, Loew's Incorporated, in accordance with its prior substituted agreement with Mertens, advanced the amount of \$37,073.27 as a loan and entered

it on its books accordingly. The amount of \$37,073.27 also included as part thereof the loan of \$301.78 with which Mr. and Mrs. Mertens' taxes attributable to their taxed French income was paid. The said \$37,073.27, as well as the amount of \$3,245.92 which Loew's Incorporated had advanced in June 1938, were valid loans made by Loew's Incorporated to plaintiff and were so posted on its books of account at the time of the transactions [27] and are still carried as an indebtedness due to Loew's Incorporated. The court finds that the foregoing loan arrangement was not a mere bookkeeping matter resorted to with the view of avoiding tax but was a bona fide new arrangement brought on by the erroneous demand of the Collector of Internal Revenue at least a week before the filing of the returns.

17. Plaintiffs did not file returns for the entire calendar year of 1938 on any printed income tax return forms supplied by the Treasury Department. Schedules were, however, attached to claims for refund subsequently filed which disclosed the total of plaintiffs' incomes for the entire year, together with deductions, showing aggregate net incomes slightly less than those shown in the departing alien returns filed on September 7, 1938.

18. On March 5, 1940, plaintiffs each filed a claim for the refund of \$9,199.65, or such amount as is legally refundable, on the ground that the Collector had erroneously added to plaintiffs' combined community incomes for the period January 1, 1938 through September 14, 1938 the amount of \$40,017.41 as income constructively received; that said amount was not constructively received and

should be excluded in computing their said community property incomes. It was further urged by plaintiffs in support of said refund claims that the amount of the tax demanded by the Collector was loaned by Loew's and for that reason also was not income during the taxable periods. The Internal Revenue Agent in Charge at Los Angeles, to whom the refund claims and 1938 returns were referred for examination, protest and hearing thereon, did not question the bona fides of the aforesaid loans, nor was their good faith questioned by the Commissioner of Internal Revenue.

19. On December 4, 1940 plaintiffs filed, by their duly authorized representative, identical letters of protest upon being advised that an examination of their tax returns for 1938 in connection with their claims for refund disclosed, in the opinion of [28] the Internal Revenue Agent in Charge at Los Angeles, no grounds for reduction of plaintiffs' tax liabilities. Following a hearing on the protests, in which it was also set forth that Loew's Incorporated had loaned the sum of \$40,017.41 to plaintiff to enable payment of the aforesaid taxes before departure from the United States, the Commissioner of Internal Revenue, acting through the head of his technical staff for the Pacific Division at Los Angeles, advised each of the plaintiffs, in a letter dated May 29, 1941, that the refund claims would be denied. By letters dated July 11, 1941 addressed to each of the plaintiffs the Commissioner gave official notice of the rejection of said claims. This suit timely followed.

Upon the foregoing findings the Court makes and enters the following:

Conclusions of Law

1. That the plaintiffs have complied with all statutory conditions constituting conditions precedent to the institution and maintenance of this action.

2. That plaintiffs were resident aliens of the United States during the taxable period involved and all of their taxable and taxed incomes constituted their community property, taxable one-half to each.

3. That the amount of \$40,017.41 was unlawfully and erroneously included, one-half in each of the plaintiff's 1938 incomes with respect to which the taxes involved were paid.

4. That the substituted agreement with Loew's Incorporated made, on or about August 30, 1938, pursuant to which the loan of \$40,017.41 was made by Loew's, was a lawful and binding agreement between the parties and its obligation remains in full force and effect. It operated to modify any prior agreements or understandings, was executed in good faith and was and is binding upon all parties and for all purposes.

5. The plaintiff Fernand Mertens overpaid his income taxes [29] for the period January 1 to September 14, 1938, inclusive, in the amount of \$8,802.40.

6. The plaintiff Victorine Catherine Renourd Mertens overpaid her income taxes for the period January 1 to September 14, 1938, inclusive, in the amount of \$8,802.40.

7. Under the law and the evidence each plaintiff is entitled to a judgment against defendant for the principal amount of tax overpayment shown in Paragraphs 5 and 6, respectively, of these conclusions, with interest thereon from September 7, 1938, according to law, plus costs.

Judgments are hereby ordered to be entered accordingly.

Dated: This 29th day of May, 1944.

Leon R. Yankwich
LEON R. YANKWICH,
Judge of the United States
District Court

Approved as to Form:

Charles H. Carr,
United States Attorney
By Edward H. Mitchell
Assistant United States
Attorney. [30]

Received copy of the within Findings of Fact and Conclusions of Law this 18th day of May, 1944 at 2:20 o'clock P. M. E. H. Mitchell, Ass't. U. S. Atty., Attorney for Defendant.

[Endorsed]: Filed May 29, 1944. [31]

In the District Court of the United States
Southern District of California

Central Division

No. 3002-Y Civil

FERNAND MERTENS, also known as FERNAND
GRAVET, and VICTORINE CATHERINE RE-
NOURD MERTENS,

Plaintiffs,

vs.

ETHEL STRICKLAND ROGAN as Executrix of the
Last Will and Testament of NAT ROGAN, Deceased,
Defendant.

JUDGMENT

This cause came on regularly for trial before the Court, without a jury, on the 28th day of March 1944, plaintiffs appearing by Loeb and Loeb, by George H. Zeutzius and Herman D. Greenschlag, defendant appearing by Charles H. Carr, United States Attorney, and Edward H. Mitchell, Assistant United States Attorney, and oral testimony, documentary evidence and evidence by stipulation as to certain of the facts having been received and the cause having been argued and submitted for decision, and the court, being fully advised, having filed herein its decision and order for judgment and findings of fact and conclusions of law, directing that judgments be entered for plaintiffs;

Now Therefore, by reason of the law and the facts herein,

It Is Ordered, Adjudged and Decreed that the plaintiff Fernand Mertens, also known as Fernand Gravet, do have and recover judgment against the defendant in the amount of \$8,802.40, together [35] with interest thereon at the rate of six (6) per centum per annum from September 7, 1938, in accordance with Section 177(b) of the Judicial Code, plus costs of \$.

It Is Further Ordered, Adjudged and Decreed that the plaintiff, Victorine Catherine Renourd Mertens do have and recover judgment against the defendant in the amount of \$8,802.40, together with interest thereon at the rate of 6% per annum from September 7, 1938, in accordance with Section 177(b) of the Judicial Code, plus costs of \$34.01.

Dated: This 29th day of May, 1944.

Leon R. Yankwich
LEON R. YANKWICH,
Judge of the United States
District Court

Approved as to form:

Charles H. Carr
United States Attorney
By E. H. Mitchell
Edward H. Mitchell
Assistant United States Attorney

[Endorsed]: Judgment entered May 29, 1944.
Docketed May 29, 1944, C. O. Book 25, page 565. Edmund L. Smith, Clerk, by Louis J. Somers, Deputy.

[Endorsed]: Filed May 29, 1944. [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Plaintiffs, Fernand Mertens, also known as Fernand Gravet, and Victorine Catherine Renourd Mertens, and Loeb and Loeb, their attorneys:

Notice Is Hereby Given that Ethel Strickland Rogan as Executrix of the Last Will and Testament of Nat Rogan, Deceased, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 29, 1944.

Dated: August 28th, 1944.

CHARLES H. CARR

United States Attorney

E. H. MITCHELL

Assistant United States Attorney

GEORGE M. BRYANT

Assistant United States Attorney

By George M. Bryant

Attorneys for Defendant-Appellant

[Endorsed]: Filed & mailed copy to Loeb & Loeb, attys. for plfs, Aug. 28, 1944. Edmund L. Smith, Clerk, by John A. Childress, Deputy Clerk. [37]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET CAUSE
ON APPEAL

Upon motion of defendant, and good cause appearing therefor:

It Is Hereby Ordered that the time within which to file the record and docket the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including the 25th day of November, 1944.

Dated this 2nd day of October, 1944.

Leon R. Yankwich

United States District Judge

[Endorsed]: Filed Oct. 2, 1944. [38]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing volume, consisting of 224 pages, numbered from one to 224 inclusive, contains a full, true and correct copy of Amended Complaint; Answer to Amended Complaint; Notice to Produce under California C. C. P. §1938; Order for Judgment; Findings of Fact and Conclusions of Law; Plaintiffs' Computation under Rule 7(h); Judgment; Notice of Appeal; Order Extending Time to Docket Cause on Appeal; Defendant's Designation of Contents of Record on Appeal; Joint Exhibit 1; Plaintiffs' Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24; Defendant's Exhibits A, B, C, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U and V; which together with Reporter's Transcript, constitute the record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

In testimony whereof, I have hereunto set my hand and affixed the seal of the District Court for the Southern District of California, this 20th day of November, in the year of our Lord one thousand nine hundred and forty-four, and of the Independence of the United States the one hundred and sixty-ninth.

[Seal]

EDMUND L. SMITH,

Clerk of the District Court of the United States for the
Southern District of California,

By R. B. Clifton,

Deputy Clerk.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Honorable Leon R. Yankwich, Judge Presiding
Los Angeles, California

March 30, 1944

Appearances:

For the Plaintiffs: Loeb & Loeb, Esqs.,
By George Zeitzius, Esq. and
Herman D. Greenschlag, Esq.,
610 Pacific Mutual Building,
Los Angeles, California.

For the Defendant: Charles H. Carr, Esq.,
United States Attorney; by
E. H. Mitchell, Esq.,
Assistant United States
Attorney. [1*]

Los Angeles, California, Thursday, March 30, 1944;
10 A. M.

Mr. Zeitzius: May it please the court, at the outset I would like, in accordance with our talk in chambers the other day, to have my admission moved specially to try this case.

The Court: That is all right; that will be done.

* * * * *

Mr. Greenschlag: All right. I move the admission of Mr. Zeitzius to practice to try this case.

The Court: All right; Mr. Zeitzius may be admitted especially for the case. I understand that he is going

through the travail of going through the examination now. [2]

* * * * *

Mr. Mitchell: There are many more questions involved, but I think that covers the primary question, your Honor.

Before stating the government's position, I think counsel will stipulate that the defendant may amend by interlineation the last line of paragraph VI of the answer to plaintiff's amended complaint. That appears on page 2 of the answer at line 19. Does your Honor find it?

The Court: Yes, I have it. [7]

Mr. Mitchell: Line 19, page 2, the amendment being to strike out the following words in line 19: "and to the plaintiff Fernand Mertens as reimbursement for."

The Court: Yes.

Mr. Mitchell: And in lieu thereof, insert the words "in respect of."

Mr. Zeitzius: That is agreed to.

The Court: All right. You had better write that in, Mr. Mitchell, and I will initial it.

Mr. Mitchell: Very well.

The Court: The amendment has been made by interlineation. [8]

* * * * *

Mr. Zeitzius: First of all, I will introduce into evidence a stipulation of a large portion of the facts in the case, together with Exhibits A to E attached thereto.

The Court: The stipulation and the exhibits will be received. Do you want them as a joint exhibit, Mr. Mitchell?

Mr. Mitchell: Very well; yes, your Honor.

The Court: As a joint exhibit, so long as you are both relying on what is in there.

Mr. Zeitzius: There is just one sentence at the very end on the last page, where we object to a single sentence on the ground it is immaterial, irrelevant and incompetent, has nothing to do with the issues in this case. [14]

* * * * *

The Court: I will reserve ruling upon that question, and the document will be received with that reservation, [15] that no ruling will be made at the present time upon the materiality of the allegation which is set forth on lines 14 and 15 of page 5 of the stipulation of facts.

Mr. Zeitzius: All right. Then, at this time, in accordance with the—

The Clerk: Joint Exhibit 1.

Mr. Mitchell: Excuse me. Is the stipulation of facts given an exhibit number?

The Court: Yes; we will give it "Joint Exhibit No. 1."

Mr. Mitchell: Joint exhibit.

(The document referred to was marked Joint Exhibit 1, and received in evidence, subject to ruling of the Court.)

[JOINT EXHIBIT 1]

In the District Court of the United States Southern District of California Central Division

Fernand Mertens, also known as Fernand Gravet, and Victorine Catherine Renourd Mertens, Plaintiffs, vs. Ethel Strickland Rogan, as Executrix of the Last Will and Testament of Nat Rogan, Deceased, Defendant. No. 3002-Y Civil

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto by their respective counsel that the following facts may be taken as true upon the trial of the above-entitled case, without prejudice however to the right of either party to offer such further evidence as he may deem necessary not inconsistent with the facts herein stipulated:

1. This action, filed June 29, 1943, is for the refund of \$18,399.30, of which each plaintiff claims \$9,199.65, as alleged overpayments of individual income taxes, plus interest thereon from the date of payment, September 7, 1938.

2. Plaintiffs are and, at all material times were, husband and wife. Plaintiff Fernand Mertens, known also as Fernand Gravet, is and at all times material hereto was a citizen [42] of Belgium. Plaintiff Victorine Catherine Renourd Mertens is and at all times material hereto was a citizen of France. Between January 1, 1938, and September 14, 1938, plaintiffs were "resident aliens" of the United States (within the meaning of the applicable Revenue Act) and resided in Los Angeles County. The parties do not stipulate as to plaintiffs' residential status before and after said period. Plaintiff Fernand Mertens

(Joint Exhibit 1)

departed from the United States on or about September 14, 1938, for Paris, France, and has not since returned to the United States. Plaintiff Victorine Mertens departed from the United States on or about June 30, 1938, for Paris, France, and has not since returned to the United States. The parties do not stipulate as to the place of domicile of the plaintiffs at any time.

3. During all of the year 1938 and thereafter until his resignation on June 30, 1943, Nat Rogan was the duly appointed, qualified, and acting Collector of Internal Revenue for the Sixth Collection District of the State of California.

4. On August 8, 1943, said Nat Rogan died, testate, and on October 8, 1943, the defendant, Ethel Strickland Rogan, his widow, was by order of the Superior Court of the State of California, in and for the County of San Diego, duly appointed executrix of the last will and testament of said Nat Rogan, and on said date she duly qualified as such executrix. Letters testamentary were thereupon issued to her out of said court and she has been ever since and now is the duly appointed, qualified, and acting executrix under said decedent's will.

5. An amended complaint was filed herein on October 28, 1943, in which the aforesaid executrix, as executrix of the said deceased Collector, was substituted and served as defendant herein.

6. During 1938 and prior to July 29 of said year, plaintiff Fernand Mertens rendered services as an actor for [43] Warner Bros. Pictures, Inc., in Los Angeles County, California, and said Warner Bros. Pictures, Inc., during 1938 and prior to September 1 of said year, paid to or for the benefit of said Mertens for his services the

(Joint Exhibit 1)

sum of \$10,204.09, which item of gross income is not in dispute.

7. During 1938 and prior to September 14 of said year, said plaintiff also rendered services as an actor for Loew's Incorporated, pursuant to the terms of a written agreement, a copy of which, or the original, will be offered in evidence. In accordance with the terms of said agreement, Loew's Incorporated during 1938 and prior to September 14, 1938, of said year, paid said plaintiff for said services the sum of \$120,000.00, exclusive of any amounts which may have been paid on account of taxes.

8. On June 24, 1938, each of the plaintiffs executed separate powers of attorney to L. G. Sutherland, J. R. White, and J. L. Wilson of Price, Waterhouse & Co. These powers were duly filed with the proper officials of the Treasury Department. True copies of said powers of attorney, marked Exhibits "A" and "B" are attached hereto and by reference made a part hereof.

9. On or about June 30, 1938, the aforesaid J. R. White and others assisted plaintiff Victorine Mertens in obtaining a certificate of compliance with federal tax statutes and regulations in order that she might depart the United States for France. Accordingly, a departing alien income tax return was executed by Mrs. Mertens for the period beginning January 1, 1938, and ending June 30, 1938, reporting one-half of the earnings of the plaintiff husband received during said period to June 30, 1938, and reporting a tax liability of \$3,245.92, which was thereupon paid to Nat Rogan as Collector of Internal Revenue. True copies of said return will be offered in evidence.

(Joint Exhibit 1)

10. Prior to September 7, 1938, plaintiff Fernand Mertens advised the office of said Collector of Internal Revenue [44] that he intended to depart the United States for France on or about September 14, 1938, and desired to obtain the necessary certificate of compliance with the Internal Revenue Laws of the United States.

11. On September 7, 1938, plaintiffs filed separate departing alien income tax returns. Copies of the two separate returns so filed by plaintiffs, together with the documents accompanying them, will be offered in evidence. Plaintiffs' said returns were filed on the cash receipts and disbursements basis of accounting.

12. Each of the plaintiffs filed a claim for refund on March 5, 1940. Said claims will be offered in evidence.

13. On December 4, 1940, plaintiffs each filed, by their duly authorized representative, identical letters of protest, except as to name, with the Internal Revenue Agent in Charge at Los Angeles. A true copy of one of the letters of protest marked Exhibit "C" is attached hereto and by reference made a part hereof.

14. By separate identical letters, except as to names, dated May 29, 1941, the Commissioner of Internal Revenue advised plaintiffs that their claims for refund would be disallowed and that notice of disallowance would be forwarded at a later date. A true copy of one of said letters marked Exhibit "D" is attached hereto and by reference made a part hereof.

15. By two separate letters dated July 11, 1941, the Commissioner of Internal Revenue advised plaintiffs that their claims for refund were disallowed in full. True copies of said letters marked Exhibits "E" and "F" are attached hereto and by reference made part hereof.

(Joint Exhibit 1)

16. Other than the three departing alien income tax returns executed by the plaintiffs in June and September, 1938, as above stipulated, no income tax return or returns on printed income return forms supplied by the Treasury Department, either [45] original, supplemental, or amendatory, reporting income of either of the taxpayers for the year 1938, or for any part thereof, was or were ever filed with the Treasury Department by the plaintiffs, or either of them, prior to the commencement of this action.

17. Prior to 1938 and continuing until December 31, 1943, Leon Levi was an attorney at law in the employ of the firm of Loeb and Loeb, attorneys of record for the plaintiffs in this case. He became a member of the firm on January 1, 1941, but left the firm on December 31, 1943. Frank Keesling was an attorney at law in the employ of said Loeb and Loeb from and after July 17, 1939. He became a member of the firm on January 1, 1943, but is now serving in the armed forces and left California about February, 1944. Said law firm of Loeb and Loeb is, and continuously since and prior to 1938 has been Los Angeles counsel for Loew's Incorporated. Plaintiffs expressly hereby reserve the right to object to the admission of the immediately preceding sentence on grounds of relevancy, materiality, and competency.

Dated: March 30, 1944.

LOEB AND LOEB

By Herman D. Greenschlag
Attorneys for Plaintiffs

CHARLES H. CARR

United States Attorney

E. H. MITCHELL

Assistant United States Attorney

By E. H. Mitchell

Attorneys for Defendant [46]

(Joint Exhibit 1)

EXHIBIT A

Know All Men By These Presents:

That I, Fernand Mertens, of 10425 Wilshire Boulevard, Beverly Hills, California, have made, constituted and appointed, and by these presents do make, constitute and appoint L. G. Sutherland, J. R. White and J. L. Wilson of Messrs. Price, Waterhouse & Co., residents of Washington, D. C., Glendale and Los Angeles, California, respectively, my true and lawful attorneys for me and in my name, place and stead to appear before the Bureau of Internal Revenue of the Treasury Department of the Government of the United States and to represent me in all matters pertaining to the Federal tax returns filed by me; to have access to and examine all documents and data in the possession of the Treasury Department with respect to my liability for income and profits taxes and other Federal taxes under any statutes of the United States imposing such taxes and to secure from the Treasury Department such information relative thereto that may be necessary in order to determine my liability for all Federal taxes. All powers of attorney previously filed by me are hereby revoked and canceled.

Giving and granting unto my said attorneys full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorneys or their substitute shall lawfully do or cause to be done by virtue hereof.

(Joint Exhibit 1)

In Witness Whereof, I have signed and sealed these presents this 24th day of June 1938.

FERNAND GRAVET MERTENS (Signed)

Subscribed and sworn to before me this 24th day of June, 1938

Seal

MARJORIE KING (Signed)

Notary Public in and for the county of Los Angeles,
state of California

My commission Expires Feb. 14, 1942. [47]

This is to certify that neither Price, Waterhouse & Co. nor any of its members or employees, including those mentioned in this power of attorney, have entered into a contingent or partially contingent fee arrangement for the representation before the Treasury Department of Fernand Mertens in the matter of Federal income taxes.

PRICE, WATERHOUSE & CO.

By R. W. Williams, a partner (Signed) [48]

EXHIBIT B

Know All Men By These Presents:

That I, Victorine Catherine Renourd Mertens, of 10425 Wilshire Boulevard, Beverly Hills, California, have made, constituted and appointed, and by these presents do make, constitute and appoint L. G. Sutherland, J. R. White and J. L. Wilson of Messrs. Price, Waterhouse & Co., residents of Washington, D. C., Glendale and Los Angeles, California, respectively, my true and lawful attorneys for me and in my name, place and stead to appear before the Bureau of Internal Revenue of the Treasury Department of the Government of the United

(Joint Exhibit 1)

States and to represent me in all matters pertaining to the Federal tax returns filed by me; to have access to and examine all documents and data in the possession of the Treasury Department with respect to my liability for income and profits taxes and other Federal taxes under any statutes of the United States imposing such taxes and to secure from the Treasury Department such information relative thereto that may be necessary in order to determine my liability for all Federal taxes. All powers of attorney previously filed by me are hereby revoked and canceled.

Giving and granting unto my said attorneys full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorneys or their substitute shall lawfully do or cause to be done by virtue hereof.

In Witness Whereof, I have signed and sealed these presents this 24th day of June, 1938.

VICTORINE CATHERINE RENOURD MERTENS
(Signed) [49]

Subscribed and sworn to before me this 24th day of June 1938

(Seal) MARJORIE KING (Signed)
Notary Public in and for the county of Los Angeles,
state of California

My Commission Expires Feb. 14, 1942

(Joint Exhibit 1)

This is to certify that neither Price, Waterhouse & Co. nor any of its members or employees, including those mentioned in this power of attorney, have entered into a contingent or partially contingent fee arrangement for the representation before the Treasury Department of Victorine Catherine Renourd Mertens in the matter of Federal income taxes.

PRICE, WATERHOUSE & CO.

By R. W. Williams, a partner (Signed) [50]

EXHIBIT C

Internal Revenue Agent in Charge,
Twelfth Floor, United States Post Office
and Court House Building,
Los Angeles, California.

In the matter of proposed disal-)	
lowance of claim for refund of)		
income tax for the calendar)		
year 1938 in the amount of)		Reference IT:R
\$9,199.65 filed by)		Treasury Department
Fernand Mertens,)		letter dated
c/o Messrs. Price, Waterhouse)		November 8, 1940
& Co.,)		
530 West Sixth Street)		
Los Angeles, California,)		
A non-resident alien)		

Dear Sir:

LETTER OF PROTEST

Under date of November 8 1940 a Treasury Department letter was addressed to taxpayer proposing to dis-

(Joint Exhibit 1)

allow his claim for refund of Federal income taxes paid for the calendar year 1938 in the amount of \$9,199.65. Taxpayer was granted a period of thirty days within which to file a protest with the Internal Revenue Agent in Charge at Los Angeles.

The taxpayer hereby protests against the action of the revenue agent in recommending disallowance of the claim. The grounds upon which he relies in support of his protest are as follows:

Taxpayer, a non-resident alien, in all of his income tax returns has reflected his income by the cash receipts and disbursements method. In 1938 Loew's Incorporated loaned \$40,017.41 to taxpayer to enable him to pay his and his wife's income tax liabilities before departure from the country. It is respectfully contended that this amount was not constructively [51] received as income in 1938. The facts are set forth in the claim for refund filed by taxpayer which by this reference is made a part of this protest.

Taxpayer respectfully submits that his Federal income tax for the calendar year 1938 has been overpaid in an amount of \$9,199.65 and it is requested that an over-assessment in this amount be determined and the claim for refund approved.

* * * * *

It is respectfully requested that an oral hearing be granted taxpayer or his representatives before an ad-

(Joint Exhibit 1)

verse decision is rendered in any of the matters herein set forth.

Yours very truly,

FERNAND MERTENS

by.....

Attorney in fact

Los Angeles, California [52]

State of California)
) SS
County of Los Angeles)

J. R. White, being duly sworn, deposes and says that under power of attorney dated June 24, 1938 and filed with the Collector of Internal Revenue at Los Angeles he is authorized to represent Fernand Mertens, the taxpayer in whose behalf the foregoing protest is submitted; that the foregoing protest was prepared under his supervision and that although he does not know of his own knowledge that the statements therein are true and correct, such statements are true and correct to the best of his information and belief.

J. R. White

Subscribed and sworn to before me this day
of December 1940

.....
Notary Public in and for the County of Los Angeles,
State of California. [53]

(Joint Exhibit 1)

EXHIBIT D

TREASURY DEPARTMENT

Bureau of Internal Revenue
Pacific Division, Technical Staff
1714 U. S. Post Office and Courthouse
Los Angeles, Calif.

Office of
Commissioner of Internal Revenue

May 29 1941

Address reply to
Head, Pacific Division, Technical
Staff and refer to
C-TS:PD
LA:AMS

Mr. Fernand Mertens
c/o Price, Waterhouse & Co.
530 West 6th Street
Los Angeles, California

In re: Income Tax
Year: 1938

Sir:

Reference is made to the above-entitled case, which was referred to this office for consideration pursuant to your request dated December 23, 1940 addressed to the Revenue Agent in Charge, Los Angeles, California, and to a conference held in this office on May 23, 1941.

You are advised that inasmuch as the taxable period was terminated in accordance with the provisions of section 146 of the Revenue Act of 1938 and the income tax liability due therefor was properly assessed and paid on September 7, 1938, your contention that the taxes paid

(Joint Exhibit 1)

in your behalf by Loew's Incorporated were not then constructively received must be denied: [54]

Inasmuch as your status after September 14, 1938 was that of a non-resident alien, any income received or losses sustained from sources without the United States subsequent to your departure would have no effect upon net income determined as of the date your taxable period was terminated. Therefore, the income tax assessed on September 7, 1938 constitutes your correct tax liability for the calendar year 1938.

The statutory notice of the disallowance of your claim will be forwarded to you at a later date by registered mail, in accordance with the provisions of section 3772(a) (2) of the Internal Revenue Code

Respectfully,

(Signed) Virgil Bean

T

Virgil Bean

Head, Pacific Division

Technical Staff [55]

EXHIBIT E

TREASURY DEPARTMENT

Washington

Office of

Commissioner of Internal Revenue

Address Reply to

Commissioner of Internal Revenue and

Refer to

IT: C1: CC-4-CCP

(Joint Exhibit 1)

July 11 1941

Mr. Fernand Mertens,
c/o Price, Waterhouse & Company,
530 West 6th Street,
Los Angeles, California
In re: Claim for refund of \$9,199.65
For the year 1938

Sir:

Reference is made to letter dated May 29, 1941 wherein you were informed that the claim for refund indicated above would be disallowed. The letter also stated the reasons for the proposed disallowance.

In accordance with the provisions of existing internal revenue law, notice is hereby given of the disallowance of your claim in full.

Respectfully,

GUY T. HELVERING,

Commissioner,

By F. Mooney (Signed)

Deputy Commissioner

213M (Revised) [56]

EXHIBIT F

TREASURY DEPARTMENT

Washington

Office of

Commissioner of Internal Revenue

Address Reply to

Commissioner of Internal Revenue Commissioner
and Refer to

IT: C1: CC-4-CCP

(Joint Exhibit 1)

July 11 1941

Mrs. Victorine C. R. Mertens,
c/o Price, Waterhouse & Company
530 West 6th Street,
Los Angeles, California
In Re: Claim for refund of \$9,199.65
For the year 1938

Madam:

Reference is made to letter dated May 29, 1941 where-
in you were informed that the claim for refund indicated
above would be disallowed. The letter also stated the rea-
sons for the proposed disallowance.

In accordance with the provisions of existing internal
revenue law, notice is hereby given of the disallowance of
your claim in full.

Respectfully

GUY T. HELVERING,
Commissioner,
By F. Mooney (Signed)
Deputy Commissioner

213M (Revised)

[Endorsed]: Case No. 3002-Y Civ. Mertens vs. Rog.
Joint Exhibit 1. Date 3/30/44. Joint 1 in Evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. Louis
J. Somers, Deputy Clerk. [57]

Mr. Zeitzius: In accordance with paragraph numbered
7 of the stipulation, Joint Exhibit 1, I wish to offer into
evidence two documents, which I will have marked in a
moment by the clerk, which I would like to show to Mr.
Mitchell.

Mr. Mitchell: May I see the originals?

Mr. Zeitzius: Yes, surely. With consent of counsel, I offer into evidence the photostats of the two original documents which are covered by paragraph 7 of the stipulation of facts and ask that they be marked.

The Clerk: Plaintiffs' Exhibits 1 and 2. Which do you desire marked first?

Mr. Mitchell: Defendant has no objection, with counsel's assurance that those are the signatures of the [16] parties to the originals. They are the signatures of the parties, is that correct, Mr. Zeitzius?

Mr. Zeitzius: That is my understanding from the gentlemen who sit here, from Loew's representative.

Mr. Mitchell: Which will be Plaintiffs' 1, and which will be Plaintiffs' 2?

The Court: Mr. Somers will tell you.

The Clerk: The photostat of the letter dated July 29th, 1938, addressed to "Mr. Fernand Gravet," will be Plaintiffs' Exhibit 1; and the letter dated July 29th, 1938, photostat, addressed to "Loew's Incorporated," will be Plaintiffs' Exhibit 2.

(The documents referred to were marked Plaintiffs' Exhibits Nos. 1 and 2, and received in evidence.)

[PLAINTIFFS' EXHIBIT 1]

Culver City, California
July 29th, 1938

Mr. Fernand Gravet,
Culver City, California.

Dear Mr. Gravet:

This will confirm the following understanding and agreement between us:

(Plaintiffs' Exhibit 1]

1. The contract between you and Mervyn LeRoy dated May 6, 1936, as the same has heretofore been amended and/or extended, has, with your consent, been assigned by Mr. LeRoy to the undersigned and we have accepted the same with the restriction that by our acceptance of the same we are assuming no liability under said contract except such liability thereunder as has arisen subsequent to April 15, 1938 in connection with the photoplay now entitled "The Great Waltz." Said contract of May 6, 1936, as the same may have heretofore been amended and/or extended, is hereinafter for convenience referred to as the "old contract."

2. It is hereby agreed that your services in said photoplay "The Great Waltz" shall continue until the completion thereof, and that your services in said photoplay shall be rendered upon the terms and conditions set forth in said old contract except as follows:

(a) That the total compensation to be paid to you for all of your services in said photoplay including such services as we may hereafter require of you in connection with retakes, added scenes, changes, sound track, process shots, etc., etc. shall be One Hundred Twenty Thousand Dollars (\$120,000.00) inclusive of such sums as have been paid to you for services rendered by you from April 15, 1938 to the date hereof.

(b) That for said total sum of One Hundred Twenty [58] Thousand Dollars (\$120,000.00) we shall be entitled to your actual services in connection with said photoplay for a period or aggregate of periods of twenty (20) weeks. Of said One Hun-

(Plaintiffs' Exhibit 1]

dred and Twenty Thousand Dollars (\$120,000.00) the sum of Seventy Two Thousand Dollars (\$72,000.00) has already been paid you, the balance to-wit: the sum of Forty Eight Thousand Dollars (\$48,000.00) shall be paid to you in weekly installments of Six Thousand Dollars (\$6,000.00) each for each week during which you render services for us hereunder. It is understood that in computing said period or aggregate of periods of twenty (20) weeks there shall be excluded the time between the completion of the ordinary photographing of said photoplay and the commencement of retakes, added scenes, changes, sound track, process shots, etc. etc., and in connection with retakes, added scenes, changes, sound track, process shots, etc. etc. only the day or days on which he actually renders services shall be included. Should the aggregate amount so payable to you between now and September 15, 1938 be less than Forty Eight Thousand Dollars (\$48,000.00), then the difference shall be paid to you upon the completion by you of all of your services in said photoplay including the completion of all of your services in connection with retakes, added scenes, changes, sound track, process shots, etc. etc., but in no event later than September 15, 1938.

(c) That you will remain available in Los Angeles until the completion of your services in said photoplay and including the completion of your services in retakes, added scenes, changes, sound track, process shots, etc. etc. provided, however, that you will not be required to remain available hereunder after September 15, 1938. [59]

(Plaintiffs' Exhibit 1]

(d) Said old contract shall be deemed to be modified and amended to the extent necessary to conform to the provisions of this instrument, but not otherwise.

3. On condition that you fully and completely keep and perform each and all of your obligations under said old contract as hereby modified, your employment under said old contract shall be deemed to be terminated as of the expiration of September 15, 1938 or as of the completion by you of all of your services in connection with said photoplay, including your services in retakes, added scenes, sound track, process shots, etc., etc., whichever shall be later; provided, however, that notwithstanding anything elsewhere herein contained our mutual obligations with respect to dubbing said photoplay into French shall be as provided in the employment contract attached hereto marked "Exhibit A," it being understood that such dubbing shall be performed between October 15, 1938 and December 15, 1938 if we so elect and if you are in France during such period, or, if we so elect, at such subsequent time or times when you are in France.

4. Attached hereto marked "Exhibit A" is a form of employment contract between you and ourselves for a proposed term of one (1) year with certain rights of extension. We hereby offer to enter into a contract with you identical in terms with said "Exhibit A"; provided, however, that this offer shall be null and void unless accepted by you by notice in writing or by telegraph or by cable to be delivered to us at our Culver City studio on or before October 15, 1938. In the event of the acceptance by you of this offer, you agree to deliver to

(Plaintiffs' Exhibit 1]

us five (5) copies of a contract identical with "Exhibit A," each of said five (5) copies to be duly executed by you, such delivery of said executed contracts to be made by you on or before [60] November 15, 1938. If said five (5) copies are so delivered to us on or before November 15, 1938, we will execute and return to you two (2) fully completed copies of the same. In the event of the acceptance by you of this offer you agree that between the completion of your services hereunder and January 1, 1939 you will not render any services to or for any other person, firm or corporation excepting only services in stage plays in France or services in photoplays to be produced, released or exhibited only in the French language or in radio broadcasts or in the making of phonograph records.

If all of the foregoing is in accordance with your understanding of our agreement, please so indicate by your acceptance hereof in the space hereinbelow provided.

Yours very truly,

LOEW'S INCORPORATED

By Benjamin Thau

~~Vice President~~

Assistant Secretary

Approved and Accepted:

Fernand Gravet

(Fernand Gravet)

[Endorsed]: Case No. 3002-Y. Mertens vs. Rogan. Pltf. Exhibit 1. Date 3/30/44. No. 1 Identification. No. 1 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [61]

[PLAINTIFFS' EXHIBIT 2]

Culver City, California

July 29th, 1938

Loew's Incorporated,
Culver City, California.

Gentlemen:

Concurrently herewith I have entered into an agreement with you covering, among other things, certain terms of my employment in connection with the photoplay now entitled "The Great Waltz"; said agreement being hereinafter for convenience referred to as the "employment agreement." This will confirm our further understanding with respect to the same:

1. On condition that I keep and perform my obligations under said employment agreement, you agree to pay all taxes which may lawfully be assessed against me in the United States, but only to the extent that such taxes are based upon sums derived by me from my services in connection with said photoplay now entitled "The Great Waltz." The provisions of this paragraph 1 shall be in lieu and in stead of any and all provisions with respect to the payment of taxes contained in my contract of employment with Mervyn LeRoy dated May 6, 1936 as the same may have heretofore been amended and/or extended. Both you and I agree to use every effort to the end that said taxes will be paid by September 10, 1938 and to the end that I shall be free to leave the United States on that date and to return whenever I desire or whenever I may be required to return.

2. I agree that in all matters in which I have any discretion, and which pertain to or affect the determination or extent of my tax liabilities in the United States, I will exercise such discretion in such manner and at such times as you may desire. Without limiting the gen-

(Plaintiffs' Exhibit 2)

erality of the foregoing, and solely by way of explaining the meaning [62] thereof, I agree, for example, that in matters wherein I have a choice, as in whether returns shall be filed on a community property or separate property basis, whether returns shall be filed on a cash or accrual basis, whether returns shall be filed on a fiscal or calendar year basis, etc., I will use such choice or selection as you may designate.

3. In the event that after having made any such choice or choices, as hereinabove in paragraph 2 described, it should ultimately and finally be determined that said choice was erroneous or unlawful, and if by reason thereof any additional tax is assessed against me, you will pay such additional assessment, but only to the extent however, that such additional assessment is due to or occasioned by moneys originally received by me from you or paid by you for me under or pursuant to said employment agreement.

4. It is agreed further that in the case of any original assessment or additional assessment, the amount of my tax to be borne by you shall be computed and determined as though the moneys received by me or paid by you under said employment agreement were and had been the only moneys received by me from any source whatsoever during the tax period or periods as to which such assessment or additional assessment has accrued, excepting only, however, certain moneys heretofore during the calendar year 1938 received by me from and/or paid for my account by Warner Bros. Pictures, Inc. With respect to said Warner Bros. Pictures, Inc. payments, it is agreed that in computing the portion of my taxes for which you are to be liable said Warner Bros. Pictures, Inc. payments are to be deemed to have been the first and lowest

(Plaintiffs' Exhibit 2)

bracketed payments received by me during 1938, and your liability shall be computed on the basis of the income with respect to which you are to pay taxes having been received after and on top of said Warner Bros. [63] Pictures, Inc. payments.

If the foregoing is in accordance with your understanding and agreement, kindly indicate your approval and acceptance thereof in the space hereinbelow provided.

Yours very truly,

Fernand Gravet
(Fernand Gravet)

Approved and Accepted:

LOEW'S INCORPORATED

By Benjamin Thau

~~Vice President~~

Assistant Secretary

[Endorsed]: Case No. 3002. Merten vs.
Pltfs. Exhibit 2. Date 3/30/44. No. 2 in Evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. L. J.
Somers, Deputy. [64]

* * * * *

Mr. Zeitzius: I offer into evidence, by agreement so far as the form in which they happen to be, that is, they [17] are photostatic and not the original documents—I offer into evidence a photostat of the original return—

Mr. Mitchell: Form 1040C.

Mr. Zeitzius: —on Form 1040C, signed by Mrs. Mertens in June of 1938, and ask that it be duly marked as an exhibit.

Mr. Mitchell: No objection. Plaintiffs' Exhibit 3?

Mr. Zeitzius: That is right.

The Clerk: Yes.

(The document referred to was marked Plaintiffs' Exhibit 3, and received in evidence.)

UNITED STATES
DEPARTING ALIEN INCOME TAX RETURN
For Taxable Period

Do not write in this space

Serial Number

Amount Paid, \$

beginning

193

and ended

19

PRINT NAME AND HOME ADDRESS PLAINLY BELOW

OCCUPATION

citizen or subject?
resident?

Date on which you last arrived in the United States

RECEIVED
WIFE ARMSTRONG
JUN 21 1938
COLL INT REV
LOS ANGELES, CAL.
J. C. G. 3.

6068

Check the appropriate block below to indicate also status:
Class I - Nonresident alien not engaged in trade or business within the United States, and not having an office or place of business therein and having a gross income of not more than \$21.00, or no gross income, received from sources within the United States, or resident of Canada (other than a citizen of the United States) not engaged in trade or business within the United States and not having an office or place of business therein.
Class II - Nonresident alien (other than a resident of Canada) with no United States business or office and having a gross income of more than \$21.00 from sources within the United States.
Class III - Resident alien.
Class IV - Nonresident alien engaged in trade or business within the United States or having an office or place of business therein.
You file income tax returns in the United States, give the following information for the past year.

Taxable income reported Tax paid District in which return was filed
There now pending any proceeding with respect to your United States income tax liability for any taxable year or period other than the taxable period covered by this return, to the best of your knowledge and belief?

COMPUTATION OF TAX

Aliens in Class I

Gross income (line 20, Schedule C)
Tax liability (10% of item 1) (5% of item 1 if resident of Canada)
Less: Income tax paid at source
Tax paid at previous departure applicable to taxable period
Balance of tax (item 2 minus items 3 and 4)

POSTING
JUL 7 1938
DATE

Aliens in Class II

Aliens in Classes III and IV

Net income (line 20, Schedule C)
Less: Personal exemption
Credit for dependents
Balance (surplus net income)
Less: Interest on U. S. obligations, etc., reported in Schedule C
Earned income credit
Balance subject to normal tax
Normal tax (4% of item 12)
Surplus on item 9
Total tax (item 15, or 10% of line 20, Schedule C, whichever is larger)
Less: Income tax paid at source
Tax paid at previous departure applicable to taxable period
Balance of tax (item 16 minus items 17 and 18)

Schedule A - EXPLANATION OF CREDITS CLAIMED IN ITEMS 7, 8, 21, AND 22. (See Instruction 9)

(a) Personal Exemption			(b) Credit for Dependents		
Status	Number of months during taxable period in each status	Credit claimed	Name of dependent and relationship	Number of months during taxable period	Credit claimed
Single, or married and not living with husband or wife				Under 18 years old	
Married and living with husband or wife				Over 18 years old	
Head of family					

Schedule B - COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 7)

(a) For Net Income of \$3,000, or less	(b) For Net Income in Excess of \$3,000
Net income (line 20, Schedule C)	1. Earned net income (not over \$14,000)
Earned income credit (10% of line 1, above)	2. Net income (line 20, Schedule C)
	3. Earned income credit (10% of line 1 or 2, above, whichever amount is smaller, but do not enter less than \$200)

GROSS INCOME

26.725.57

DEDUCTIONS (Not to be claimed by aliens in Class I)

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
---	---	---	---	---	---	---	---	---	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	-----

Income (line 20 minus line 29)

We swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable period stated, and is true to the applicable revenue acts and the regulations issued thereunder.

Victorine Mortens Gravé

DEPUTY COL

James F. McDonald

 (Signature and title of officer administering oath.)
 and made by an agent must be accompanied by power of attorney.

If this is a joint return (not made by an agent) it must be signed by both husband and wife and sworn to before a proper officer by the spouse preparing the return, or if neither or both prepare the return then by both spouses.

This certifies that the above-named individual(s) has (have) satisfied all United States income, war-profits, and excess-profits tax
 tions with respect to income received or to be received, determined as nearly as may be, up to and including the intended date of
 ture indicated above, according to all information available to me at this date.

193



By

(Outline of National Revenue, as Estimated Revenue Act is in Charge)

Chief Office Deputy

(Total)

FERNAND MERTENS

(known professionally as Fernand Gravet)

VICTORINE CATHERINE RENOURD MERTENS

DATA FOR INCOME TAX LIABILITY OF MRS. MERTENS
TO DATE OF DEPARTURE JUNE 25 1938

Income from salary:	
Warner Bros. Pictures, Inc.	\$10,204.09
Metro-Goldwyn-Mayer Studios	<u>48,000.00</u>
	\$58,204.09
<u>Deduct:</u>	
Commissions paid agent, Mrs. Ad. Schulberg	<u>5,237.50</u>
Net income from sources within United States	\$52,966.59
Income from other sources:	
Rentals from flats in Paris -	
34,000 francs for year 1938	
converted .0278-7/8 (rate	
published in Wall Street Journal	
for June 16 1938) equals	<u>\$945.18</u>
For six months ending June 30 1938	<u>474.09</u>
Total income	<u>\$53,440.68</u>
Amount taxable to Mrs. Mertens - one-half	\$26,720.34

State of California
County of Los Angeles

J. F. White acting on behalf of Messrs
Price Waterhouse & Co. 530 W. Sixth St. Los Angeles
as advisor to Mrs. Mertens affirms that he
prepared the attached statement showing income
taxable to Mrs. Mertens of \$26,720.34 on
the basis of information furnished by Louis
Dunepontat, Warner Bros. Pictures Inc. and
Mr. Mertens without independent verification
and that to the best of his knowledge and
belief the information contained therein is true
and correct although he does not know of his own
knowledge that the information is true and correct.

J. F. White

Subscribed and sworn to
before me this 21st day
of June 1938

Geo F McDonald DC

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Pltf. Exhibit 3. Date 3/30/44. No. 3 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. L. J. Somers, Deputy Clerk.

Mr. Zeitzius: I offer into evidence as Plaintiffs' Exhibit 4, the taxpayer's copy of Form 1040C which is the Plaintiffs' Exhibit 3. This one now is Plaintiffs' Exhibit 4. I think your Honor must benefit more by looking at the larger copy and it will be easier to read.

(The document referred to was marked Plaintiffs' Exhibit 4, and received in evidence.) [18]

Department

(FORM 1040-C)
(Revised Feb. 1935)

Internal Revenue Service

UNITED STATES
DEPARTING ALIEN INCOME TAX RETURN

For Taxable Period

Do not write in this space

Serial
NumberAmount
Paid

Check

Exact

By

New York

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

June 29-35

beginning Jan 1 1935 and ending June 30 1935

PRINT NAME AND HOME ADDRESS MAINLY BELOW

Westmont Martin & Mrs Bernard E

10425 Cheshire Blvd

Westwood Calif

OCCUPATION: Housewife

U.S.A.

Date on which you last arrived in the United States June 11-1935

District in which return was filed

45922

Californica Paid by husband

1935

COMPUTATION OF TAX

Aliens in Class I

Income tax paid at source		
Income tax paid at previous departure applicable to taxable period		
Income tax (Item 2 minus Items 3 and 4)		

Aliens in Class II

Aliens in Classes III and IV

Income tax paid at source			
Income tax paid at previous departure applicable to taxable period			
Income tax (Item 16 minus Items 17 and 18)			
20. Net income (line 30, Schedule C)			26720.87
21. Less: Personal exemption	625.00		
22. Credit for dependents			625.00
23. Balance (surplus net income)			26095.87
24. Less: Interest on U. S. obligations, etc., reported in Schedule C			
25. Earned income credit	7400.18		
26. Balance subject to normal tax			20695.69
27. Normal tax (4% of item 26)			827.83
28. Surplus on item 26			21523.52
29. Total tax (Items 27 and 28)			22351.35
30. Less: Income tax paid at source			
31. Tax paid at previous departure applicable to taxable period			
32. Balance of tax (Item 29 minus Items 30 and 31)			22351.35

Schedule A.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 7, 8, 21, AND 22. (See Instruction 7)

(a) Personal Exemption

Status	Number of months during taxable period in each status	Credit claimed
Married and not living with husband or wife		
Living with husband or wife	6	625.00

(b) Credit for Dependents

Name of dependent and relationship	Number of months during taxable period		Credit claimed
	Under 18 years old	Over 18 years old	

Schedule B.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 7)

(a) For Net Income of \$3,000, or less

1. Earned net income (not over \$16,000)	
2. Net income (line 30, Schedule C)	
3. Earned income credit (10% of line 1 or 2, above, whichever amount is smaller, but do not enter less than \$300)	

(b) For Net Income in Excess of \$3,000

1. Earned net income (not over \$16,000)	26720.87
2. Net income (line 30, Schedule C)	
3. Earned income credit (10% of line 1 or 2, above, whichever amount is smaller, but do not enter less than \$300)	7400.18

(COPY TO BE RETAINED BY TAXPAYER)

2-1637

[Endorsed]: Case No. 3002-Y. Mertens vs. Rogan. Pltf. Exhibit 4 in Evidence. Date 3/30/44. Clerk, U. S. District Court, Sou. Dist. of Calif. L. J. Somers, Deputy Clerk.

* * * * *

Mr. Mitchell: May I see that exhibit for just a moment, your Honor, for purposes of the record, the one you have in your hand?

May the record show that the last exhibit offered by the plaintiffs contains the notice of termination of the taxable period and demand for payment of the tax, as well as the certificate of compliance which, under the rules and regulations, must be shown to the department of the government at the place of embarkation.

The Court: All right.

Mr. Zeitzius: I think the document will speak for itself and I do not wish to make any additional observations.

The Court: All right.

Mr. Zeitzius: May I next offer into evidence the photostatic copy of Form 1040C filed by Mr. Mertens on September 7, 1938, which the government counsel has agreed [19] to furnish.

The Clerk: Plaintiff's Exhibit 5.

Mr. Mitchell: Is this it?

Mr. Zeitzius: Yes. I understand that this will be marked Plaintiffs' Exhibit 5, the document I just referred to.

The Clerk: So marked.

(The document referred to was marked Plaintiffs' Exhibit 5, and received in evidence.)

(FORM 1040-C)
(Revised Feb. 1968)

Internal Revenue Service

UNITED STATES
DEPARTING ALIEN INCOME TAX RETURN
For Taxable Period

Do not write in this space

Serial
Number

261

Amount
Paid, \$

(Check for exemption)

RECEIVED
WITH REMITTANCE

Check

SEP 7 1968

Examined By

TOLLYNT. REV.
LOS ANGELES, CAL.

O. G. B.

OCCUPATION

Country are you a resident?

Date on which you last arrived in the United States

Indicate appropriate block below to indicate alien status

I. — Nonresident alien not engaged in trade or business within the United States and not having an office or place of business therein and having a gross income of not more than \$21,000 (or no gross income) received from sources within the United States, or resident of Canada (other than a citizen of the United States) not engaged in trade or business within the United States and not having an office or place of business therein

II. — Nonresident alien (other than a resident of Canada) with no United States business or office and having a gross income of more than \$21,000 from persons within the United States

III. — Resident alien.

IV. — Nonresident alien engaged in trade or business within the United States or having an office or place of business therein.

Exempt income reported

Tax paid

District in which return was filed

On pending any processing with respect to your United States income tax liability for any taxable year or period other than the taxable period covered by this return, to the best of your knowledge and belief?

COMPUTATION OF TAX

Aliens in Class I

Income (line 20, Schedule C) \$ 0
Deductions (10% of line 1) (5% of line 1 if resident of Canada) \$ 0
Income tax paid at source \$ 0
Tax paid at previous departure applicable to taxable period \$ 0
Total tax (line 3 minus items 3 and 4) \$ 0

Aliens in Class II

Income (line 20, Schedule C) \$ 0
Personal exemption \$ 0
Credit for dependents \$ 0
Surplus net income \$ 0
Interest on U. S. obligations, etc., reported in Schedule C \$ 0
Earned income credit \$ 0
Subject to normal tax \$ 0
Normal tax (4% of line 12) \$ 0
Total tax (line 3 minus items 3 and 4) \$ 0
Income tax paid at source \$ 0
Tax paid at previous departure applicable to taxable period \$ 0
Total tax (line 16 minus items 17 and 18) \$ 0

Aliens in Classes III and IV

20. Net income (line 20, Schedule C) \$ 7742.51
21. Less: Personal exemption \$ 833.34
22. Credit for dependents \$ 242.66
23. Balance (surplus net income) \$ 7666.51
24. Less: Interest on U. S. obligations, etc., reported in Schedule C \$ 14.00
25. Earned income credit \$ 1400.00
26. Balance subject to normal tax \$ 6252.51
27. Normal tax (4% of item 26) \$ 250.10
28. Surplus on item 26 \$ 6002.41
29. Total tax (items 27 and 28) \$ 250.10
30. Less: Income tax paid at source \$ 0
31. Less: Tax paid at previous departure applicable to taxable period \$ 0
32. Balance of tax (item 29 minus items 30 and 31) \$ 250.10

Schedule A. — EXPLANATION OF CREDITS CLAIMED IN ITEMS 7, 8, 21, AND 22. (See Instruction 7)

(a) Personal Exemption

Status	Number of months during taxable period in each status	Credit claimed
Married and not living with husband or wife	8	833.34
Not living with husband or wife		
Single		

(b) Credit for Dependents

Name of dependent and relationship	Number of months during taxable period		Credit claimed
	Under 18 years old	Over 18 years old	
Mr. Emanuel Mestow		72 6 months	237.66

Schedule B. — COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 7)

(a) For Net Income of \$3,000, or less

Income (line 30, Schedule C) \$ 0
Income credit (10% of line 1, above) \$ 0

(b) For Net Income in Excess of \$3,000

1. Earned net income (not over \$14,000) \$ 1400.00
2. Net income (line 30, Schedule C) \$ 7742.51
3. Earned income credit (10% of line 1 or 2, above, whichever amount is smaller, but do not enter less than \$900) \$ 1400.00

GROSS INCOME

Total gross income

DEDUCTIONS (Not to be claimed by aliens in Class I)

Total deductions

mean (line 20 minus line 29)

AFFIDAVIT

and/or (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable period stated, pursuant to the applicable revenue acts and the regulations issued thereunder.

ed and sworn to by

me this _____ day of _____, 193_____

SEP 6 - 1938 DEPUTY COLLECTOR

made by an agent must be accompanied by power of attorney

NOTICE OF TERMINATION OF TAXABLE PERIOD AND DEMAND FOR PAYMENT OF TAXES DUE

and, in accordance with the provisions of section 604 of the Revenue Act of 1936, notice is hereby served on the individual(s) whose name(s) appear(s) on the reverse of this sheet, that the period of such individual(s) as declared terminated as of the date of departure from the United States, and demand is hereby made for the payment of the tax due for the period declared terminated; and for the payment of any United States income taxes due the United States for prior years which have not been paid.

by acknowledged .

GUY T. HELVERING,
Commissioner

CERTIFICATE OF COMPLIANCE

I, the undersigned, certify that the above-named individual(s) has (have) satisfied all United States income, war-profits, and excess-profits tax obligations with respect to income received or to be received, determined as nearly as may be, up to and including the intended date of departure indicated above, according to all information available to me at this date.

United Office Reporting

SEP 6 - 1938



34

PRICE, WATERHOUSE & CO.

310 WEST SIXTH STREET

LOS ANGELES

September 7 1938

Collector of Internal Revenue,
939 South Broadway,
Los Angeles, California.

Dear Sir:

FERNAND MERTENS
VICTORINE CATHERINE RENOUARD MERTENS

There is enclosed a schedule showing the data for determining the income tax liability of Mr. and Mrs. Mertens to date of departure of Mr. Mertens, September 14 1938. It will be noted that the income from profession includes an item of \$40,017.41 entitled "1938 Federal income tax claimed by Collector of Internal Revenue to be 'constructively received' from Loew's Incorporated." This item represents the amount your office estimates is payable by Loew's Incorporated to Mr. and Mrs. Mertens on account of the contract of employment with the company.

It has been contended on behalf of the taxpayers that the amount payable by Loew's Incorporated cannot be determined until after the end of 1938 and should not be included in computing the taxable income of Mr. and Mrs. Mertens for 1938; however, your office has ruled that this amount must be included and the tax paid thereon before Mr. Mertens' sailing permit will be issued.

Yours very truly,

Price Waterhouse & Co.

Enclosure -
Schedule

(known professionally as Fernand Gravet)

INCOME TAX RETURN OF FERNAND GRAVET

TAX LIABILITY OF FERNAND GRAVET

For the year ending September 15, 1938

Occupation:

Self-employed -

1938 Federal old age benefits tax

\$120,000.00

30.00

\$120,030.00

Merchandise, Inc. -

1938

\$ 4,375.00

1937 Federal income tax

4,592.06

1938 Federal income tax

1,020.41

1938 California income tax

83.08

1938 California unemployment insurance tax

98.54

1938 Federal old age benefits tax

30.00

10,204.00

1938 Federal income tax claimed by Collector of Internal Revenue to be "constructively received" from Loew's Incorporated

40,017.40

\$170,251.50

Less - Business expenses:

Commission paid agent

\$ 12,437.50

Wardrobe 50% of \$298.90

149.45

Books and records for research

18.28

Studio valet (salary \$479 - expenses

581.40

mostly meals \$102.40)

Wigs, make-up supplies, etc.

69.32

Publicity

337.55

Telephone calls to France on business

1,170.50

Special set of teeth for picture "The Great Waltz"

250.00

Dues - Screen Actors Guild

75.00

Automobile expenses:

Chauffeur's salary and meals

\$ 915.90

Gas and oil, \$183.66, parking, etc.

211.96

\$23.30

Insurance - total for year commencing

\$1.35

April 1938 \$102.71, one-half thereof

Depreciation of Packard sedan at 25%

per annum -

Cost April 1938 \$1,800

Depreciation for six months at 25%

225.00

\$11,404.21

Less - One-half thereof allocated to personal use

702.10

15,791.10

\$154,480.40

Contribution.

Mount Sinai Hospital

\$ 10.00

Dues:

Federal telephone

5.30

California income

88.08

California unemployment insurance

98.54

201.92

Net income from sources within United States

\$154,258.48

Income from other sources:

Rentals from flats in Paris -

Rentals for 1938

34,000 francs

Expenses for year

3,400 francs

Net for year

30,600 francs

Converted at \$.0273 (rate published in Wall

Street Journal for August 18 1938) equals

\$835.56

For eight and one-half months ending September 15 1938

\$91.70

Net income

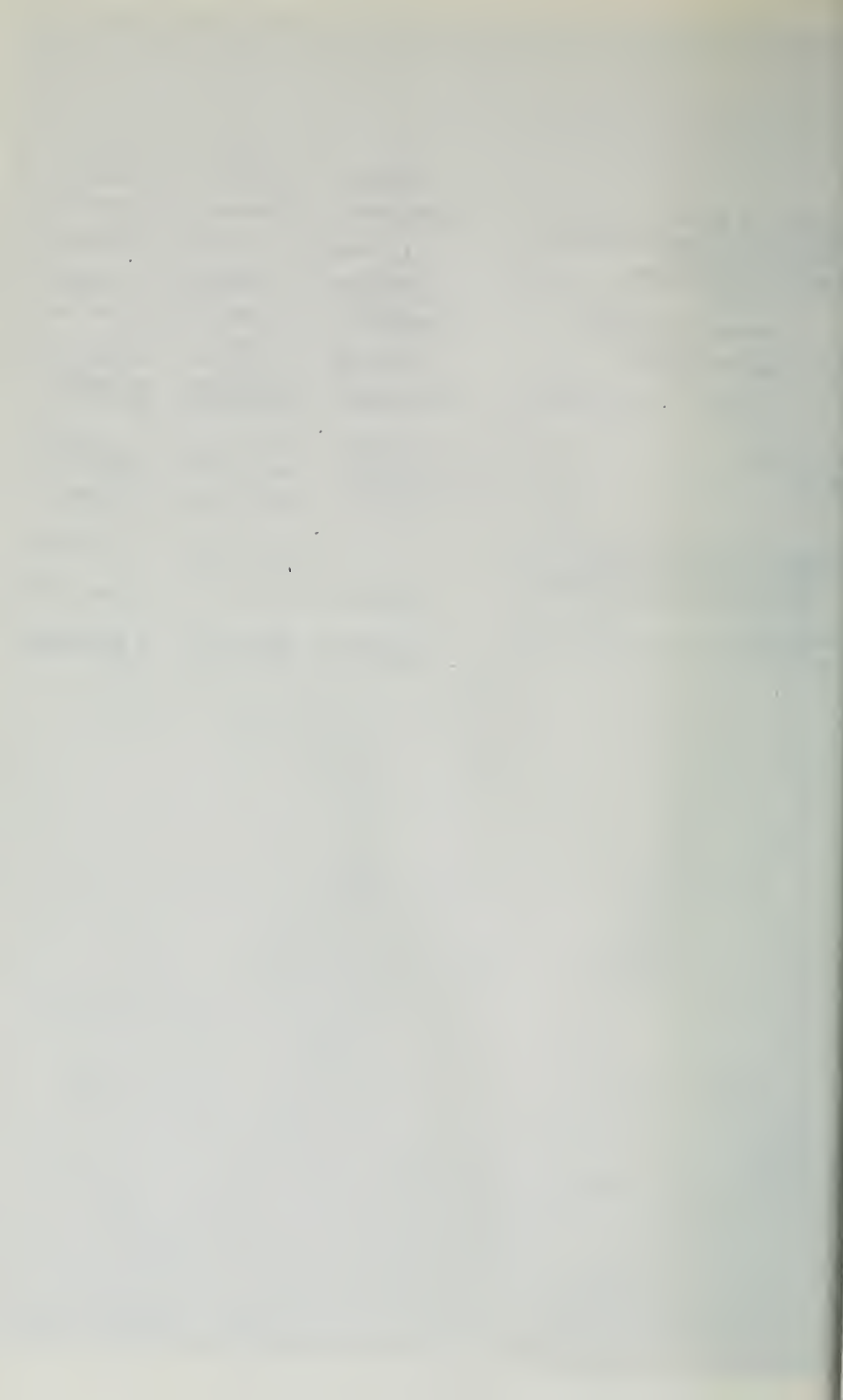
\$154,350.24

	Mr. Mertens	Mrs. Mertens	Total
Income as above	\$77,425.11	\$77,425.10	\$154,850.21
Credit for personal exemption - 8/12 of \$2,800	(833.34)	(833.33)	(1,666.67)
Credit for dependents - 8/12 of \$800	(266.66)	(266.67)	(533.33)
Surtax net income	\$76,325.11	\$76,325.10	\$152,650.21
Earned income credit	1,400.00	1,400.00	2,800.00
Normal tax net income	\$74,925.11	\$74,925.10	\$149,850.21
Normal tax	\$ 2,997.00	\$ 2,997.00	\$ 5,994.00
Surtax	17,672.80	17,672.80	35,345.60
	\$20,669.80	\$20,669.80	\$ 41,339.60
Less:			
Amount previously paid		(3,245.92)	(3,245.92)
Amount withheld at source by Warner Bros. Pictures, Inc.	(1,020.41)		(1,020.41)
Amount payable to obtain sailing permit	\$19,649.39	\$17,423.88	\$ 37,073.27

Total tax

Less tax on 591.7
ES 4 and 3

301.7
41,037.82
1,020.41
40,017.41



STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) SS

J. R. White, acting on behalf of Messrs.
Price, Waterhouse & Co., 530 West Sixth Street, Los
Angeles, California, as advisor to Mr. and Mrs.
Fernand Mertens, affirms that he prepared the attached
statement on the basis of information furnished by
Mr. and Mrs. Mertens and Boew's Incorporated and that
to the best of his knowledge and belief the information
therein is true and correct although he does not know
of his own knowledge that all of the statements therein
are true and correct.

J. R. White

Subscribed and sworn to before me
this 6th day of September 1938.

Elsie C. Smith

NOTARY PUBLIC in and for the County
of Los Angeles, State of California
My Commission Expires November 20, 1939.

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Pltf. Exhibit 5. Date 3/30/44. No. 5 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. L. J. Somers, Deputy Clerk.

Mr. Zeitzius: I now wish to call the Court's attention to the fact that Plaintiffs' Exhibit 5 included as part thereof a photostat of a letter dated September 7, 1938, to the "Collector of Internal Revenue," by Price-Waterhouse & Co., together with the schedules and information referred to in that letter, consisting of two additional pages.

As Plaintiffs' Exhibit 6 I offer into evidence—

Mr. Mitchell: May I see that?

Mr. Zeitzius: --Form 1040C referred to in paragraph 9 of the stipulation.

Mr. Mitchell: The taxpayer's copy.

Mr. Zeitzius: Which is the taxpayer's copy of the document offered as Plaintiffs' Exhibit 5.

The Clerk: Plaintiffs' Exhibit 6.

(The document referred to was marked Plaintiffs' Exhibit 6, and received in evidence.)

30327
Wick
chandise
4/28
Finance
Pro O

UNITED STATES
DEPARTING ALIEN INCOME TAX RETURN

For Taxable Period

Jan 1st 1958 and ended Sept 1st 1958
PRINT NAME AND HOME ADDRESS (MAY BE BY MAIL)
Fernand Merlens, Fernand Merlens
10425 Wilshire Blvd
Westwood Calif

OCCUPATION

Belgium

Are you a citizen or subject of the United States?

Date on which you last arrived in the United States

1958, 1959

Do not write in this space

Serial Number

Amount Paid

WITH REMITTANCE

Check SEP 7 1958

COLL. INT. REV.
LOS ANGELES, CAL.

Appropriate block below to indicate alien status

- I. - Nonresident alien not engaged in trade or business within the United States and not having an office or place of business therein and having a gross income of not more than \$21,000 (or no gross income) received from sources within the United States, or resident of Canada (other than a citizen of the United States) not engaged in trade or business within the United States and not having an office or place of business therein.
II. - Nonresident alien (other than a resident of Canada) with no United States business or office and having a gross income of more than \$21,000 from sources within the United States.
III - Resident alien.
IV - Nonresident alien engaged in trade or business within the United States or having an office or place of business therein.

Income tax returns in the United States, give the following information for the past 3 years:

Income tax paid

District in which return was filed

Not in USA
459207

600 Calif

pending any proceeding with respect to your United States income tax liability for any taxable year or period other than the taxable period covered by this return, to your knowledge and belief

COMPUTATION OF TAX

Aliens in Class I

Line 20, Schedule C		
10% of item 1 (10% of item 1 if resident of Canada)		
Tax paid at source		
Tax paid at previous departure applicable to taxable period		
Tax (Item 2 minus items 3 and 4)		

Aliens in Class II

Line 20, Schedule C	1	20. Net income (line 20, Schedule C)	1	7700 77
Personal exemption	1	21. Less Personal exemption	1	833 34
For dependents		22. Credit for dependents		240 16
Surplus net income	1	23. Balance (surplus net income)		7658 77
Less on U S obligations, reported in Schedule C		24. Less Interest on U S obligations, etc., reported in Schedule C		1400 00
Net income credit		25. Earned income credit		1400 00
Subject to normal tax	1	26. Balance subject to normal tax		7418 77
(4% of item 12)		27. Normal tax (4% of item 26)		2967 58
Item 3		28. Surplus on item 23		1700 00
Items 13 and 14		29. T 1 tax (Items 27 and 28)		5367 58
Item 15, or 10% of line 20, Schedule C, whichever		30. Tax paid at previous departure		1020 41
Tax paid at source		31. Tax paid at previous departure applicable to taxable period		1469 59
Tax paid at previous departure applicable to taxable period		32. Balance of tax (Item 20 minus items 30 and 31)		
Tax (Item 16 minus items 17 and 18)				

Schedule A. - EXPLANATION OF CREDITS CLAIMED IN ITEMS 7, 8, 21, AND 22. (See Instruction 7)

(a) Personal Exemption

Status	Number of months during taxable period in such status	Credit claimed	Name of dependent and relationship	Number of months during taxable period	Credit claimed
Married and not living with husband or wife	8	833 34	My Family	72 months	235 66
Living with husband or wife					

Schedule B. - COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 7)

(a) For Net Income of \$3,000, or less

Line 20, Schedule C	1	1. Earned net income, not over \$4,000		1400 00
Earned income credit (10% of line 1, above)		2. Net income (line 20, Schedule C)		7418 77
		3. Earned income credit (10% of line 1 or 2, above, whichever amount is smaller, but do not enter less than \$50)		140 00

(b) For Net Income in Excess of \$3,000

(COPY TO BE RETAINED BY TAXPAYER)

CROSS INCOME

Total gross income

7742511

DEDUCTIONS (Not to be claimed by aliens in Class D)

Total deductions

7542-77

AFFIDAVIT

described and sworn to by

before me this _____ day of _____, 193_____

J. P. O'Brien
(Signature and title of officer administering oath)
returns made by an agent must be accompanied by power of attorney.

DEPUTY COLLECTOR

LECTURE
If this is a joint return (not made by an agent) it must be signed by both husband and wife and sworn to before a proper officer by the spouse preparing the return, or if neither or both prepare the return then by both spouses.

CERTIFICATE OF COMPLIANCE

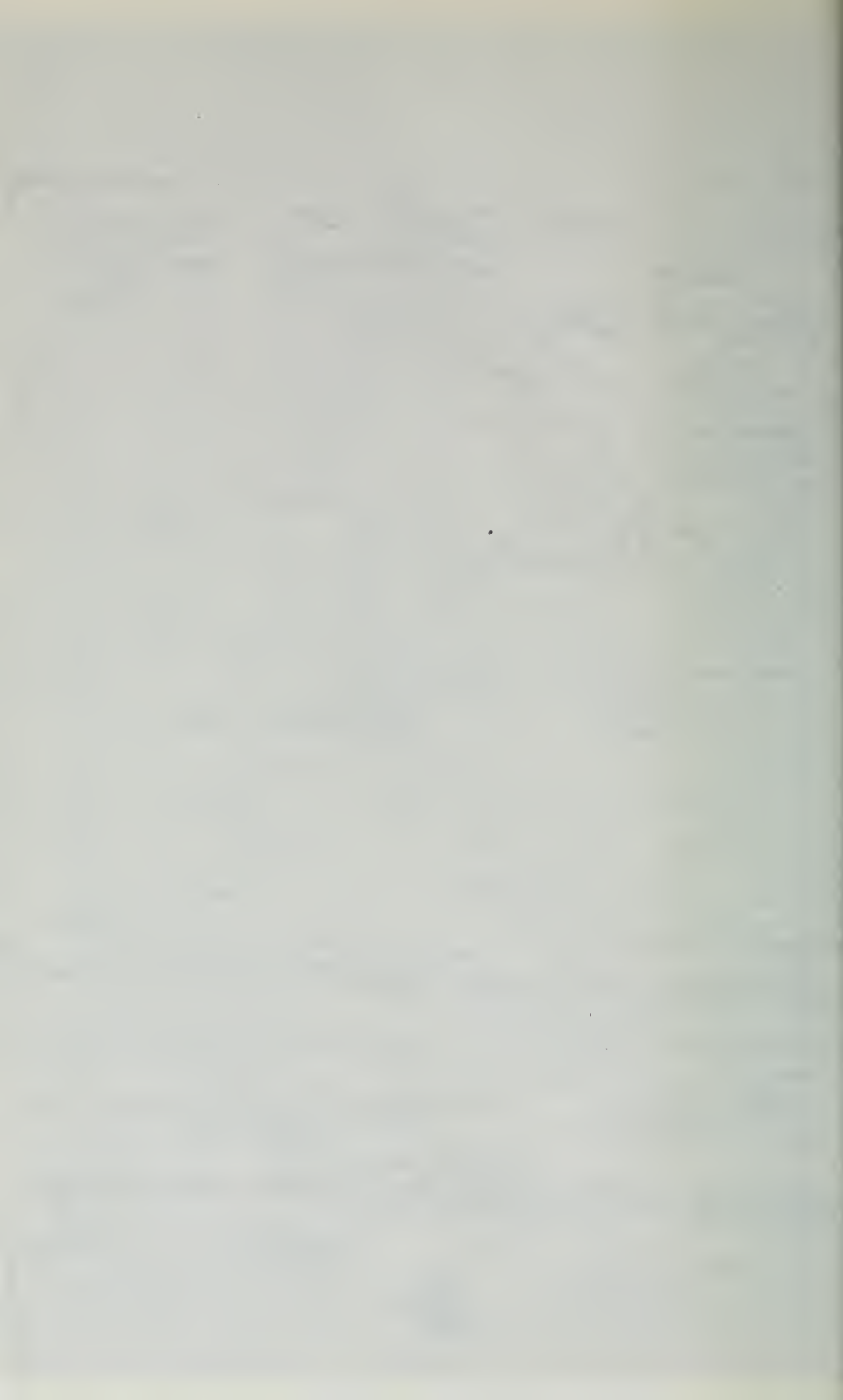
This certifies that the above-named individual(s) has (have) satisfied all United States income, war-profits, and excess-profits tax obligations with respect to income received or to be received, determined as nearly as may be, up to and including the intended date of departure indicated above, according to all information available to me at this date.

SEP 6 - 1938

By



4-2



[Endorsed]: Case No. 3002. Mertens vs. Rogan. Pltf. Exhibit No. 6 in Evidence. Date 3/30/44. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk.

Mr. Zeitzius: As Plaintiffs' Exhibit 7 I offer the original copy of Form 1040C filed on September 7, 1938, by [20] Mr. Mertens.

The Clerk: A photostat, Plaintiffs' Exhibit 7.

(The document referred to was marked Plaintiffs' Exhibit 7, and received in evidence.)

Department

(FORM 1040-C)
(Revised Feb. 1938)

Internal Revenue Service

UNITED STATES
DEPARTING ALIEN INCOME TAX RETURN
For Taxable Period

Do not write in this space

Serial Number 260

beginning

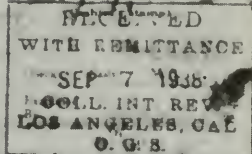
193

and ended

193

PRINT NAME AND HOME ADDRESS PLAINLY BELOW

Amount Paid, \$



OCCUPATION

What country are you a citizen of or subject resident?

Check the appropriate box as to your status:

Class I - Nonresident alien not engaged in trade or business in the United States and not having an office or place of business therein and not having any other income taxable in the United States.

Class II - Nonresident alien engaged in trade or business in the United States and not having an office or place of business therein and not having any other income taxable in the United States.

Class III - Resident alien.

Class IV - Alien who has been present in the United States for more than 180 days in the taxable year and who has not been present in the United States for more than 180 days in the taxable year.

Taxable income reported Tax paid District in which return was filed

COMPUTATION OF TAX

Aliens in Class I

Income (line 21, Schedule C)
Liability (10% of item 1) (5% of item 1) (5% of item 1) (5% of item 1)
Income tax paid at source
Tax paid at previous departure applicable to taxable period
Amount of tax (item 2 minus items 3 and 4)

Aliens in Class II

Aliens in Classes III and IV

Income (line 21, Schedule C)
Personal exemption
Credit for dependents
Balance (surplus) net income
Less: Interest on U. S. obligations, etc., reported in Schedule C
Earned income credit
Balance subject to normal tax
Normal tax (4% of item 2)
Surplus on item 2
Total tax (items 7 and 8)
Less: Income tax paid at source
Tax paid at previous departure applicable to taxable period
Amount of tax (item 10 minus items 17 and 18)

Schedule A - EXPLANATION OF CREDITS CLAIMED IN ITEMS 7, 8, 21, AND 22. (See Instruction 7)

(a) Personal Exemption

(b) Credit for Dependents

Status	Number of months during taxable period in each status	Credit claimed	Name of dependent and relationship	Number of months during taxable period	Credit claimed
Married and not living with husband or wife				Under 18 years old	
Married and living with husband or wife				Over 18 years old	
Single					
Widow					
Family					

Schedule B - COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 7)

(a) For Net Income of \$3,000, or less

(b) For Net Income in Excess of \$3,000

Income (line 21, Schedule C)
Earned income credit (10% of line 1 or 2, above, whichever amount is smaller, but do not enter less than \$200)

GROSS INCOME

al gross income

DEDUCTIONS (Not to be claimed by aliens in Class D)al deductions.

me (line 20 minus line 29)

AFFIDAVIT

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable period stated, and the applicable revenue acts and the regulations issued thereunder.

and sworn to by

On this 7th day of Sept, 1938

(Signature and title of officer administering oath)

de by an agent must be accompanied by power of attorney.

DEITY ..

If this is a joint return (not made by an agent) it must be signed by both husband and wife and sworn to before a proper officer by the spouse preparing the return, or if neither or both prepare the return then by both spouses.

CERTIFICATE OF COMPLIANCE

certifies that the above-named individual(s) has (have) satisfied all United States income, war-profits, and excess-profits tax with respect to income received or to be received, determined as nearly as may be, up to and including the intended date of indicated above, according to all information available to me at this date.

Conference of National Governors on Local Government April 24-25, 1962

193.



By

\$4,000

Page: 2-16392

I, Victorine Catherine Renourd Mertens, residing at 10425 Wilshire Boulevard, Beverly Hills, California, being unable by reason of continuous absence from the United States since June 29 1938 to make the income tax return required to be filed by me for the taxable year 1938, have made, constituted and appointed, and, by these presents, do make, constitute and appoint my husband, Fernand Mertens, a resident of the United States, whose address is 10425 Wilshire Boulevard, Beverly Hills, California, my true and lawful attorney for me and in my name, place and stead, to execute and to file the income tax return required by any Act or Acts of Congress to be made by me for the taxable year 1938.

Victorine Catherine Renourd Mertens

Dated at 271 Ave 2
this 26 day of June 1938.

Executed in presence of:

Acknowledged before me this
_____ day of _____ 1938.

(Title)

*adon Mertens me
doux Renourd Victor*

*J. Le Capitaine Moncege
doux*

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Pltfs. Exhibit 7. Date 3/30/44. No. 7 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J Somers, Deputy Clerk.

Mr. Zeitzius: I next offer into evidence taxpayer's copy, in photostatic form, of Form 1040C, filed by Mrs. Mertens on September 7, 1938.

Mr. Mitchell: May the record show that Exhibits 6 and 8 also contain the certificate of compliance as well as the Commissioner's determination or termination of taxable period?

Mr. Zeitzius: We ask that the return should speak for itself.

The Court: He merely is calling the Court's attention to the contents, that is all. Whatever is in the certificate speaks for itself.

Mr. Zeitzius: Yes. I want to call attention to the fact that—

The Court: The legal effect of it is a different proposition.

Mr. Zeitzius: We find that these three returns are signed by the taxpayer and there is no receipt of acknowledgment by it of the taxpayer. I call attention to that fact. It may or may not be significant in the light of the evidence which will develop.

The Court: I don't know what you mean. Each of them [21] swore to the affidavit.

Mr. Zeitzius: You will notice, your Honor, that I am calling attention to the fact there is fine print requiring the acknowledgment by the taxpayer. I do not know at the moment that this is going to be important. However, as long as Mr. Mitchell called your attention to it, I also wanted to call attention to that fact.

Mr. Mitchell: If the Court please, these two documents, I think the record should certainly show, in the light of what counsel says, were furnished by plaintiffs and not by the government.

Mr. Zeitzius: That is right.

Mr. Mitchell: Because the government has no copy of them.

Mr. Zeitzius: That is correct.

Mr. Mitchell: If there is any question about them having been delivered to the taxpayers, then I will object to their admission.

Mr. Zeitzius: No; we do not question that those are true copies of the papers delivered to the taxpayers.

The Court: I see. All right.

(The document referred to was marked Plaintiffs' Exhibit 8, and received in evidence.)

Department

(FORM 1040-C)
(Revised Feb. 1938)

Internal Revenue Service

Do not write in this space

60293
New York
Monmouth
6/29/38
Finance
Circ

UNITED STATES DEPARTING ALIEN INCOME TAX RETURN

For Taxable Period

beginning Jan 1st 1938, and ended Sept 1st 1938

NAME, NAME AND HOME ADDRESS PLAINLY BELOW

Walter H. Maters (husband)
10425 Maters Road
Westwood, Calif

OCCUPATION

Housewife

citizen or subject
resident?

U.S.A.

Date on which you last arrived in the United States

Serial Number

Amount Paid \$

(Cashier's stamp)

RECEIVED
WITH REMITTANCE

Example By SEP 2 1938
COLL. INT. REV.
LOS ANGELES, CAL.
O. G. S.

The appropriate block below to indicate alien status

Class I - Non-resident alien not engaged in trade or business within the United States and not having an office or place of business therein of not more than \$21,000 (or no gross income) received from sources within the United States, or resident of Canada (other than a citizen of the United States) and not engaged in trade or business within the United States and not having an office or place of business therein

Class II - Non-resident alien (other than a resident of Canada) with no United States business or office and having a gross income of more than \$21,000 from sources within the United States.

Class III - Regular alien

Class IV - Non-resident alien engaged in trade or business within the United States or having an office or place of business therein.

Class V - Resident alien engaged in trade or business within the United States, give the following information for the past 3 years.

Taxable income reported

Tax paid

District in which return was filed

Not in U.S.A.
5492415 459207

Do not include any preceding with respect to your United States income tax liability for any taxable year or part of other than the taxable period covered by this return, to the best of your knowledge and belief.

COMPUTATION OF TAX

Aliens in Class I

Income (line 20, Schedule C)

Ability (line 10, Item 1 (b), of the 1040-C resident of Canada)

Income tax paid at source

Tax paid at previous departure applicable to taxable period

Credit tax (item 21, pay items 21 and 22)

Aliens in Class II

Aliens in Classes III and IV

Income (line 30, Schedule C)

Personal exemption

Credit for dependents

Surplus net income

Interest on U.S. obligations, etc., reported in Schedule C

Earned income credit

Subject to normal tax

Normal tax (4% of item 20)

Surplus on item 21

Total tax (items 21 and 22)

Less: Income tax paid at source

Tax paid at previous departure applicable to taxable period

Credit tax (item 21, pay items 21 and 22)

Schedule A. EXPLANATION OF CREDITS CLAIMED IN ITEMS 7, 8, 21, AND 22. (See Instruction 7)

(a) Personal Exemption

(b) Credit for Dependents

Status	Number of dependents claimed	Name of dependent and relationship	Number of months during taxable period	Credit claimed
			Under 14 years old	Over 14 years old
Married and not living with husband for	8	Walter H. Maters	76	286 67
Married with husband for wife	8	Walter H. Maters	76	286 67

Schedule B. COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 7)

(a) For Net Income of \$1,000 or less

(b) For Net Income In Excess of \$1,000

Income (line 30, Schedule C)

Earned income credit (line 1 or 2, above, whichever is the greater, but not to exceed less than \$50)

Earned net income of less than \$1,000

Net income (line 30, Schedule C)

Earned income credit (line 1 or 2, above, whichever is the greater, but not to exceed less than \$50)

(COPY TO 1 - RETAINED BY TAXPAYER)

2-10337

GROSS INCOME

Total gross income

DEDUCTIONS (Not to be claimed by aliens in Class I)

Total deductions

t income (line 20 minus line 29).

AFFIDAVIT

We swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable period stated, pursuant to applicable revenue acts and the regulations issued thereunder.

ribed and sworn to by

day of August 1934

Signature and title of officer administering oath

DEPUTY COLLECTOR

If this is a joint return (not made by an agent) it must be signed by both husband and wife and sworn to before a proper officer by the spouse preparing the return, or if neither or both prepare the return then by both spouses.

NOTICE OF TERMINATION OF TAXABLE PERIOD AND DEMAND FOR PAYMENT OF TAXES DUE

According to the provisions of section 144 of the Revenue Act of 1906, notice is hereby served on the individual(s) whose name(s) appear(s) on the reverse of this sheet, that the period of such individual's estate is declared terminated as of the date of departure from the United States, and demand is hereby made for the payment of the tax due for the period declared terminated and for the payment of any United States income taxes due the United States for prior years which have not been paid.

pt of above police

erely acknowledged.

GUY T. HELVERING,

CERTIFICATE OF COMPLIANCE

This certifies that the above-named individual(s) has (have) satisfied all United States income, war-profits, and excess-profits taxations with respect to income received or to be received, determined as nearly as may be, up to and including the intended date of return indicated above, according to all information available to me at this date.

Chief Office U.S. U.S.

(If officer of Internal Revenue or Internal Revenue Agents in Charge)

SEP 7 - 1949

193



By

[Endorsed]: Case No. 3002. Pltf. Exhibit No. 8 in Evidence. Date 3/30/44. Clerk, U. S. District Court, Sou. Dist. of Calif. L. J. Somers, Deputy Clerk.

Mr. Zeitzius: Referring now to paragraph—oh, I want to make a correction. The four returns, or, rather, the four last documents offered, are all returns filed [22] September 7, 1938. They are referred to in paragraph 11 of the stipulation and not paragraph 9 as I have stated.

The Court: All right.

Mr. Zeitzius: Paragraph 12 of the stipulation states that the refund claims filed on March 5, 1940, will be offered into evidence. I therefore offer into evidence as Plaintiffs' Exhibit 9 the photostatic copy furnished by the government of the claim for refund filed by Mr. Mertens, which is a photostat of the original refund claim as filed, together with the supporting schedules attached thereto.

The Court: It may be received as 9.

(The document referred to was marked Plaintiffs' Exhibit 9, and received in evidence.)

[PLAINTIFFS' EXHIBIT 9]

United States [Crest] of America

[Written]: Claim

TREASURY DEPARTMENT

Washington

July 22, 1943

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Claim for Refund of \$9,199.65 income tax for 1938 (with statement, schedules and affidavit attached) filed by F. Mertens (Fernand Mertens) c/o Loew's Incorporated, Culver City, California, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[Seal]

F. A. Birgfeld

F. A. Birgfeld

Chief Clerk, Treasury Department. [91]

Form 648
RECAPTURE DEPARTMENT
INTERNAL REVENUE SERVICE
Revised June 1939

CLAIM

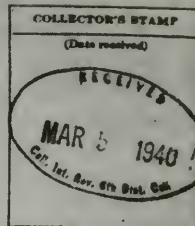
TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

AUG 23 1940

- ☒ REFUND OF TAX ILLEGALLY COLLECTED.
☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.
☐ ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

STATE OF California 500007-1939 List
 COUNTY OF Los Angeles REPUBLIC OF FRANCE, CITY OF PARIS
 PLATE GENERAL OF THE UNITED STATES OF AMERICA } 33
 Sept. 261-1938 List



TYPE
OR
PRINT

Name of taxpayer or purchaser of stamps Fernand Mortana
 c/o Loew's Incorporated
 Business address 10202 Washington Boulevard, Culver City, California
 (Street) (City) (State)
 Residence _____

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

District in which return (if any) was filed Sixth California
 Period (if for income tax, make separate form for each taxable year) from January 1, 1938, to December 31, 1938
 Character of assessment or tax Federal income tax
 Amount of assessment, \$20,669.80; dates of payment Sept. 7 1938 \$19,649.39 withheld \$1,020.41
 Date stamps were purchased from the Government _____
 Amount to be refunded, OR such amount as is legally refundable \$ 9,199.65
 Amount to be abated (not applicable to income or estate taxes) _____
 The time within which this claim may be legally filed expires, under Section _____ of the Revenue Act of 19____, on _____, 19____.

The deponent verily believes that this claim should be allowed for the following reasons:

Statement attached



(Attach letter-size sheets if space is not sufficient)

Sworn to and subscribed before me this

Signed

day of January 1939

[Signature]

JOHN R. WOOD

(Title)

SEE INSTRUCTIONS ON REVERSE SIDE

Vice Consul of the United States
 of America at Paris, France

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Character of assessment and period covered	List	Year	Month	ACCOUNT NO. OR		Amount assessed	PAID, ABATED, OR CREDITED			Pd. Ab. Cr.
				Page	Line		Date	Amount		
1040-C 1-1-38 9-1-'38	IT	1938	Sept.	261		\$ 19,649 39	9/7/'38	\$ 19,649 39		Pd.
Warner Bros. Pictures, Inc., 1938	IT	1938		600007		2,601 66	6/3/'39	2,601 66		Pd.
Total,						\$ 22,251 05	Total,	\$ 22,251 05		

I certify that the records of this office show the following facts as to the purchase of stamps:

TO WHOM SOLD OR ISSUED	Kind	Number	Denomination	Date of sale or issue	Amount	If special tax stamp, state:	
						Serial number	Period commencing
						REJECTED 27115 I. T. SCHEIDT	

Har Ragan
Collector of Internal Revenue.

5th California
(District)

COMMITTEE ON CLAIMS

Claim examined by—
Claim approved by—
Chief of Division.

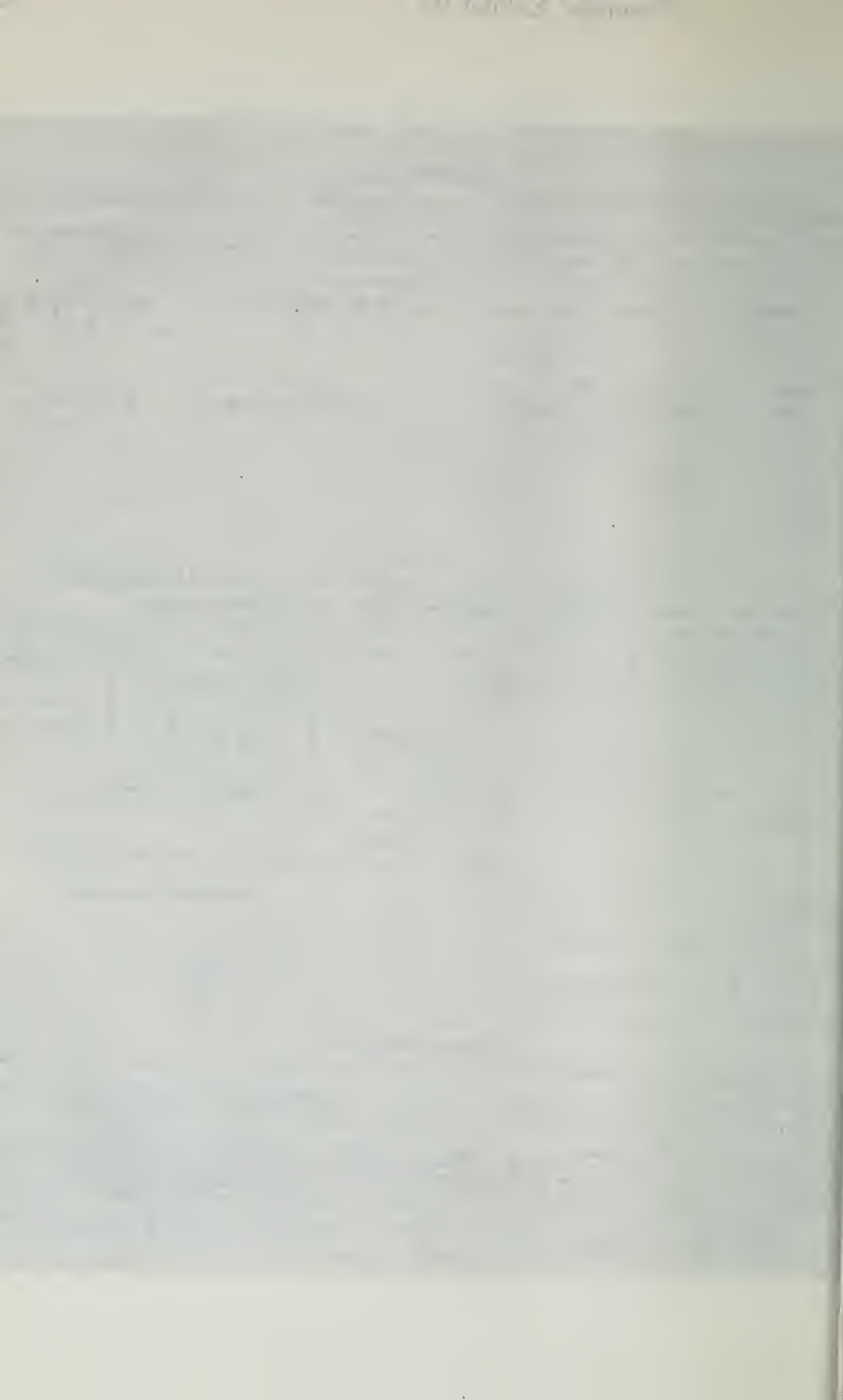
Amount claimed... \$.....

Amount allowed... \$.....

Amount rejected... \$.....

INSTRUCTIONS

- The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.
- The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney, agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.
- If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.
- Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.



(Plaintiffs' Exhibit 9)

Fernand Mertens (known professionally as Fernand Gravet) entered into a contract with Loew's Incorporated for his services in a motion picture "The Great Waltz." Under the terms of the contract Mr. Mertens was to be paid \$120,000 and the company agreed to reimburse him for any Federal income taxes lawfully assessed because of his earnings from "The Great Waltz." For the purpose of determining taxpayer's income tax liability at the date of departure of Mr. Mertens, September 14, 1938, information was filed with the Collector of Internal Revenue at Los Angeles showing community net income for the period of \$113,938.37. The Collector's office was informed of the terms of Mr. Mertens' contract with Loew's Incorporated and it was explained that no obligation existed under the contract to reimburse Mr. Mertens for the taxes until after the close of the calendar year 1938 because it was impossible to determine the amount of Federal income taxes on the income involved until after the close of the taxable period.

The Collector's office however considered as income "constructively received" in 1938 an amount of \$40,017.41 representing the amount the Collector's office estimated would be payable by Loew's Incorporated to Mr. and Mrs. Mertens as reimbursement for Federal income taxes under the terms of the contract. It is contended that this amount was not "constructively received" in 1938 and should be excluded in computing taxpayer's income for that year.

There are attached (1) three schedules showing the income and deductions of Mr. and Mrs. Mertens for the year 1938; (2) a reconciliation of the net income shown by these schedules with the net income shown by the

(Plaintiffs' Exhibit 9)

data filed with the Collector of Internal Revenue to obtain a compliance certificate (sailing permit) to date of Mr. Mertens' departure from the United States, September 14, 1938 and (3) computations of indicated overassessments.

Claim is hereby made for refund of the indicated overassessments with interest as provided by law. [94]

FERNAND MERTENS

(Known professionally as Fernand Gravet)

VICTORINE CATHERINE RENOURD MERTENS 1938 INCOME TAX RETURNS

Summary of Income and Deductions

	<u>Total</u>	<u>Reported by</u>	
		<u>Husband</u>	<u>Wife</u>
<u>Income</u>			
<u>(schedules attached)</u>			
Salaries and other compensation for personal services	\$114,691.77	\$57,345.89	\$57,345.88
Rents	473.40	236.70	236.70
Loss from farm	(15.78)	(7.89)	(7.89)
Total income	\$115,149.39	\$57,574.70	\$57,574.69
<u>Deductions</u>			
<u>(schedules attached)</u>			
Contributions	\$ 10.00	\$ 5.00	\$ 5.00
Taxes	1,404.22	702.11	702.11
Total deductions	\$ 1,414.22	\$ 707.11	\$ 707.11

(Plaintiffs' Exhibit 9)

Net income for

Federal returns	\$113,735.17	\$56,867.59	\$56,867.58
-----------------	--------------	-------------	-------------

Add—California in-

come tax	88.08	44.04	44.04
----------	-------	-------	-------

Net income for

California returns	\$113,823.25	\$56,911.63	\$56,911.62
--------------------	--------------	-------------	-------------

[95]

FERNAND MERTENS

(Known professionally as Fernand Gravet)

VICTORINE CATHERINE RENOURD MERTENS

1938 INCOME TAX RETURNS

Income

Salaries and other compensation for personal services:

Loew's Incorporated, Culver City, California—

Salary	\$120,000.00
--------	--------------

1938 California unemployment insurance taxes	1,212.30
--	----------

1938 Federal old age benefits tax	30.00
-----------------------------------	-------

\$121,242.30

Warner Bros. Pictures, Inc., Burbank, California—

Salary	\$ 4,375.00
--------	-------------

(Plaintiffs' Exhibit 9)

Federal old age benefits tax	30.00	
1938 California unemployment insurance taxes	98.54	
1937 Federal income tax	4,592.06	
1938 Federal income tax	1,020.41	
1938 California income tax	88.08	
		<hr/>
		10,204.09
		<hr/>
		\$131,446.39

Less—Business expenses:

Commission paid agent	\$ 12,437.50
Wardrobe—50% of \$298.90	149.45
Books and records for research	18.28
Studio valet (salary \$479— expenses, mostly meals, \$102.40)	581.40
Gratuities to studio employees	119.28
Wigs, make-up supplies, etc.	69.32
Publicity	337.55
Telephone calls to France on business	1,170.50
Dental and skin treatments, including \$250 for special set of teeth for picture, "The Great Waltz"	1,025.15
Dues, Screen Actors Guild	75.00

(Plaintiffs' Exhibit 9)

Automobile expenses:

Chauffeur's salary
and meals \$ 915.90

Gas and oil \$188.66,
parking, etc.
\$23.30 211.96

Insurance—total for
year commencing
April 1938 \$102.71,
nine-twelfths thereof 77.03

Depreciation of Pack-
ard sedan at 25%
per annum—

Cost, April
1938 \$1,800.00

Depreciation for
nine months 337.50

\$1,542.39

Less—One-half thereof
allocated to personal
use

771.19

16,754.62

\$114,691.77

[96]

(Plaintiffs' Exhibit 9)

FERNAND MERTENS

(Known professionally as Fernand Gravet)

VICTORINE CATHERINE RENOUD MERTENS

1938 INCOME TAX RETURNS

Rents:

Rentals from flats in Paris 25,000 francs

Expenses for year 7,000 francs

 Net income for year 18,000 francs

 Converted at \$.0263 (rate
 at December 31 1938,
 I. T. 3247) equals

 \$ 473.40

Loss from Farm:

Farm income 10,200 francs

Expenses for year 10,800 francs

 Net loss for year (600) francs

Converted at \$.0263 as above

 \$ (15.78)

Deductions

Contribution—

Mt. Sinai Hospital

 \$ 10.00

Taxes:

California unemployment insurance taxes \$1,310.84

Federal tax on telephone messages 5.30

 Total for California income tax return \$1,316.14

(Plaintiffs' Exhibit 9)

<u>Add</u> —California income tax	88.08
-----------------------------------	-------

Total for Federal income tax return	\$1,404.22
-------------------------------------	------------

[97]

FERNAND MERTENS

(Known professionally as Fernand Gravet)

VICTORINE CATHERINE RENOUD MERTENS

1938 CALIFORNIA INCOME TAX RETURNS

Reconciliation of net income reported in attached returns with data filed with Collector of Internal Revenue at Los Angeles for purpose of obtaining compliance certificate (sailing permit) to date of departure of Fernand Mertens from the United States, September 14 1938.

Net income for Federal return, per attached schedule	\$113,735.17
--	--------------

1938 Federal income tax claimed by Collector of Internal Revenue to be "constructively received" from Loew's Incorporated	40,017.41
---	-----------

Gratuities to studio employees	119.28
--------------------------------	--------

Dental and skin treatments	775.15
----------------------------	--------

Additional automobile expenses:

Insurance	\$ 25.68
-----------	----------

Depreciation	112.50
--------------	--------

	\$138.18
--	----------

(Plaintiffs' Exhibit 9)

Less—One-half thereof allo-		
cated to personal use	69.09	
	<hr/>	69.09
Adjustment of rents:		
Per data filed with Collector	\$591.73	
Per attached schedules	473.40	
	<hr/>	118.33
Loss from farm		15.78
		<hr/>
Net income per data filed with Collector of Internal Revenue		\$154,850.21
		=====
		[98]

FERNAND MERTENS
VICTORINE CATHERINE RENOURD MERTENS
1938 FEDERAL INCOME TAXES

Computation of Indicated Overassessments

	Mr. <u>Mertens</u>	Mrs. <u>Mertens</u>
Net income per attached schedule	\$56,867.59	\$56,867.58
Personal exemption	(850.00)	(1,650.00)
Credit for dependents	(800.00)	
	<hr/>	<hr/>
Surtax net income	\$55,217.59	\$55,217.58
Earned income credit	1,400.00	1,400.00
	<hr/>	<hr/>
Normal tax net income	\$53,817.59	\$53,817.58
	=====	=====
Surtax	\$ 9,317.45	\$ 9,317.45
Normal tax	2,152.70	2,152.70
	<hr/>	<hr/>

(Plaintiffs' Exhibit 9)

Total tax	\$11,470.15	\$11,470.15
Previously paid or withheld at source	20,669.80	20,669.80
	<hr/>	<hr/>
Indicated overassessments	\$ 9,199.65	\$ 9,199.65
	<hr/>	<hr/>

[99]

State of California)
) ss
County of Los Angeles)

J. R. White, acting on behalf of Messrs. Price, Waterhouse & Co., 530 West Sixth Street, Los Angeles, California, as advisor to Fernand Mertens, affirms that he prepared the attached claim for refund showing over-assessment of Federal income taxes for 1938 in the amount of \$9,199.65 and that to the best of his knowledge and belief the statements therein are true and correct, although he does not know of his own knowledge that all of the statements therein are true and correct.

J. R. White
J. R. White

Subscribed and sworn to before me this 2nd day of May 1939.

[Seal]

Elsie Evershed

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires November 20, 1939

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Ptf. Exhibit 9. Date 3/30/44. No. 9 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [100]

Mr. Zeitzius: Your Honor may be interested in reading the third page which relates to the grounds.

The Court: All right; I will look at that.

Mr. Zeitzius: As Plaintiffs' Exhibit 10—

Mr. Mitchell: Does counsel want the wife's claim to be introduced?

Mr. Zeitzius: Yes, please. The Plaintiffs offer into evidence the photostatic copy of the original of the claim for refund referred to in the stipulation, filed by Mrs. Mertens on March 5, 1940, together with the attached schedules and papers.

The Clerk: 10.

(The document referred to was marked Plaintiffs' Exhibit 10 and received in evidence.) [23]

[PLAINTIFFS' EXHIBIT 10]

United States [Crest] of America

[Written]: Claim

TREASURY DEPARTMENT

Washington

July 22, 1943

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Claim for Refund of \$9,199.65 Income Tax for 1938 (with affidavit, statement and schedules attached), filed by Victorine Catherine Renourd Mertens c/o Loew's Incorporated, Culver City, fornia, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[Seal]

F. A. Birgfeld

F. A. Birgfeld

Chief Clerk, Treasury Department [101]

Form 423
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised June 1939

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

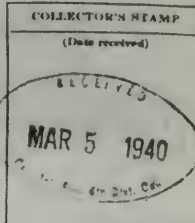
The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☒ REFUND OF TAX ILLEGALLY COLLECTED.
☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.
☐ ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

STATE OF California July 246-1938 List
COUNTY OF Los Angeles Sept. 260-1938 List
REPUBLIC OF FRANCE CITY OF PARIS
DATE OF GENERAL OF THE UNITED STATES OF AMERICA

TYPE
OR
PRINT

Name of taxpayer or purchaser of stamps Victorine Catherine Renourd Mertens
c/o Loew's Incorporated
Business address 10202 Washington Boulevard, Culver City, California
(Street) (City) (State)
Residence _____



The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named and that the facts given below are true and complete:

District in which return (if any) was filed Sixth California
Period (if for income tax, make separate form for each taxable year) from January 1, 1938, to December 31, 1938
Character of assessment or tax Federal income tax
Amount of assessment, \$ 20,662.80; dates of payment June 28 1938, Sept. 7 1938
Date stamps were purchased from the Government _____
Amount to be refunded OR such amount as is legally refundable \$ 9,199.65
Amount to be abated (not applicable to income or estate taxes) \$ _____
The time within which this claim may be legally filed expires, under Section _____ of the Revenue Act of 19____
on _____, 19____

The deponent verily believes that this claim should be allowed for the following reasons:

Statement attached

(Attach letter when sheets of space is not sufficient)

Sworn to and subscribed before me this

Signed

Sixth day of June 1937

Victorine Catherine Renourd Mertens
Mertens

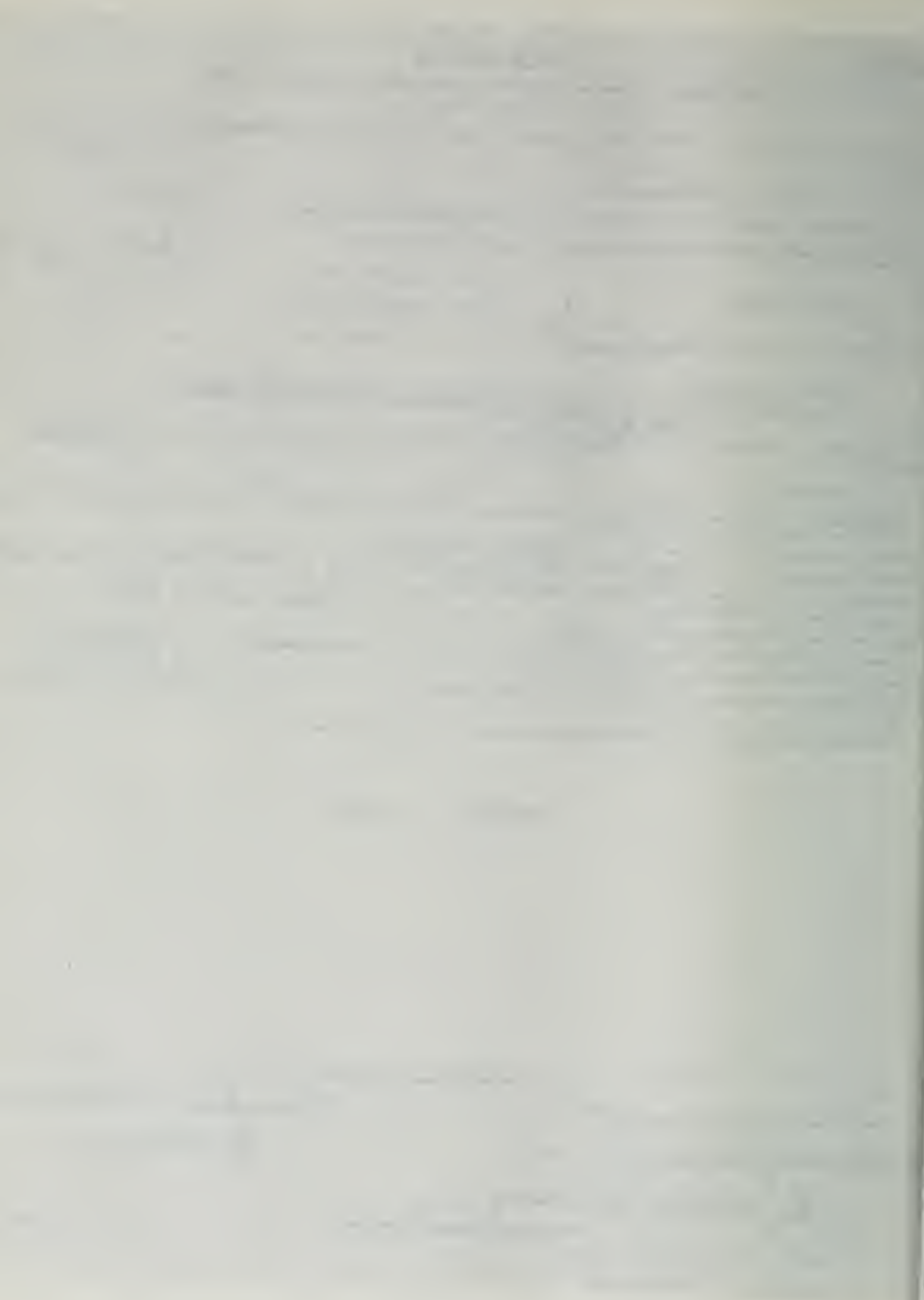
(Signature of officer administering oath)

JOHN R. WOOD

(Title)

(SEE INSTRUCTIONS ON REVERSE SIDE)

Vice-Consul of the United States
of America at Paris, France



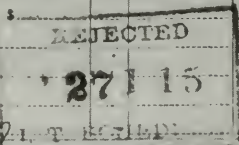
CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Character of assessment and period covered	List	Year	Month	ACCOUNT NO. OR		Amount assessed	PAID, ABATED, OR CREDITED		Pd. Ab. Cr.
				Page	Line		Date	Amount	
1040-C						\$		\$	
1-1-'38	IT	1938	July	246-		3,245 92	6/21/'38	3,245 92	Pd.
6-30-'38									
1040-C									
1-1-'38	IT	1938	Sept.	260		17,423 88	9/7/'38	17,423 88	Pd.
9-1-'38									
Total.						\$ 20,669 80	Total,	\$ 20,669 80	

I certify that the records of this office show the following facts as to the purchase of stamps:

TO WHOM SOLD OR ISSUED	Kind	Number	Denomination	Date of sale or issue	Amount	If special tax stamp, state:	
						Serial number	Period commencing



L. T. ROGUE
Collector of Internal Revenue.

6th California
(District)

COMMITTEE ON CLAIMS

Claim examined by—
Claim approved by—
Chief of Division

Amount claimed... \$

Amount allowed... \$

Amount rejected... \$

INSTRUCTIONS

- The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.
- The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.
- If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copy of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.
- Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

(Plaintiffs' Exhibit 10)

State of California)
) ss
County of Los Angeles)

J. R. White, acting on behalf of Messrs. Price, Waterhouse & Co., 530 West Sixth Street, Los Angeles, California, as advisor to Victorine Catherine Renourd Mertens, affirms that he prepared the attached claim for refund showing overassessment of Federal income taxes for 1938 in the amount of \$9,199.65 and that to the best of his knowledge and believe the statements therein are true and correct, although he does not know of his own knowledge that all of the statements therein are true and correct.

J. R. White

J. R. White

Subscribed and sworn to before me this 2nd day of May 1939.

Elsie Evershed

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires November 20, 1939 [104]

Fernand Mertens (known professionally as Fernand Gravet) entered into a contract with Loew's Incorporated for his services in a motion picture "The Great Waltz." Under the terms of the contract Mr. Mertens was to be paid \$120,000 and the company agreed to reimburse him for any Federal income taxes lawfully assessed because of his earnings from "The Great Waltz." For the purpose of determining taxpayer's income tax liability at the date of departure of Mr. Mertens, September 14

(Plaintiffs' Exhibit 10)

1938, information was filed with the Collector of Internal Revenue at Los Angeles showing community net income for the period of \$113,938.37. The Collector's office was informed of the terms of Mr. Mertens' contract with Loew's Incorporated and it was explained that no obligation existed under the contract to reimburse Mr. Mertens for the taxes until after the close of the calendar year 1938 because it was impossible to determine the amount of Federal income taxes on the income involved until after the close of the taxable period.

The Collector's office however considered as income "constructively received" in 1938 an amount of \$40,017.41 representing the amount the Collector's office estimated would be payable by Loew's Incorporated to Mr. and Mrs. Mertens as reimbursement for Federal income taxes under the terms of the contract. It is contended that this amount was not "constructively received" in 1938 and should be excluded in computing taxpayer's income for that year.

There are attached (1) three schedules showing the income and deductions of Mr. and Mrs. Mertens for the year 1938; (2) a reconciliation of the net income shown by these schedules with the net income shown by the data filed with the Collector of Internal Revenue to obtain a compliance certificate (sailing permit) to date of Mr. Mertens' departure from the United States, September 14 1938 and (3) computations of indicated overassessments.

Claim is hereby made for refund of the indicated over-assessments with interest as provided by law. [105]

(Plaintiffs' Exhibit 10)

FERNAND MERTENS

(Known professionally as Fernand Gravet)

VICTORINE CATHERINE RENOURD MERTENS

1938 INCOME TAX RETURNS

Summary of Income and Deductions

		<u>Reported by</u>	
	<u>Total</u>	<u>Husband</u>	<u>Wife</u>
<u>Income</u>			
(schedules attached)			
Salaries and other compensation for personal services	\$114,691.77	\$57,345.89	\$57,345.88
Rents	473.40	236.70	236.70
Loss from farm	(15.78)	(7.89)	(7.89)
	<hr/>	<hr/>	<hr/>
Total income	\$115,149.39	\$57,574.70	\$57,574.69
	<hr/>	<hr/>	<hr/>
<u>Deductions</u>			
(schedules attached)			
Contributions	\$ 10.00	\$ 5.00	\$ 5.00
Taxes	1,404.22	702.11	702.11
	<hr/>	<hr/>	<hr/>
Total deductions	\$ 1,414.22	\$ 707.11	\$ 707.11
	<hr/>	<hr/>	<hr/>
Net income for Federal returns	\$113,735.17	\$56,867.59	\$56,867.58
Add—California income tax	88.08	44.04	44.04
	<hr/>	<hr/>	<hr/>
Net income for California returns	\$113,823.25	\$56,911.63	\$56,911.62
	<hr/>	<hr/>	<hr/>

(Plaintiffs' Exhibit 10)

FERNAND MERTENS

(Known professionally as Fernand Gravet)

VICTORINE CATHERINE RENOURD MERTENS

1938 INCOME TAX RETURNSIncomeSalaries and other compensation
for personal services:Loew's Incorporated, Culver
City, California—

Salary \$120,000.00

1938 California unem-
ployment insurance
taxes

1,212.30

1938 Federal old age
benefits tax

30.00

\$121,242.30Warner Bros. Pictures, Inc.,
Burbank, California—

Salary \$ 4,375.00

Federal old age benefits
tax

30.00

1938 California unem-
ployment insurance
taxes

98.54

1937 Federal income
tax

4,592.06

1938 Federal income
tax

1,020.41

(Plaintiffs' Exhibit 10)

1938 California income
tax

88.08

10,204.09

\$131,446.39

Less—Business expenses:

Commission paid agent \$ 12,437.50

Wardrobe—50% of \$298.90 149.45

Books and records for re-
search 18.28

Studio valet (salary \$479—
expenses, mostly meals,
\$102.40) 581.40

Gratuities to studio employees 119.28

Wigs, make-up supplies, etc. 69.32

Publicity 337.55

Telephone calls to France on
business 1,170.50

Dental and skin treatments, in-
cluding \$250 for special set
of teeth for picture, "The
Great Waltz" 1,025.15

Dues, Screen Actors Guild 75.00

Automobile expenses:

Chauffeur's salary
and meals \$ 915.90

Gas and oil \$188.66,
parking, etc.. \$23.30 211.96

(Plaintiffs' Exhibit 10)

Insurance—total for
 year commencing
 April 1938 \$102.71,
 nine-twelfths thereof 77.03

Depreciation of Pack-
 ard sedan at 25%
 per annum—

Cost, April
 1938 \$1,800.00

Depreciation for
 nine months 337.50

\$1,542.39

Less—One-half thereof
 allocated to personal
 use

771.19

16,754.62

\$114,691.77

=====

[107]

FERNAND MERTENS

(Known professionally as Fernand Gravet)

VIVTORINE CATHERINE RENOURD MERTENS

1938 INCOME TAX RETURNS

Rents:

Rentals from flats in Paris 25,000 francs

Expenses for year 7,000 francs

(Plaintiffs' Exhibit 10)

Net income for year	18,000 francs
---------------------	---------------

=====

Converted at \$.0263 (rate at December 31 1938, I. T. 3247) equals	
--	--

\$ 473.40

=====

Loss from Farm:

Farm income	10,200 francs
-------------	---------------

Expenses for year	10,800 francs
-------------------	---------------

=====

Net loss for year	(600) francs
-------------------	--------------

=====

Converted at \$.0263 as above	\$ (15.78)
-------------------------------	------------

=====

Deductions

Contribution—

Mt. Sinai Hospital	\$ 10.00
--------------------	----------

=====

Taxes:

California unemployment insurance taxes	\$1,310.84
---	------------

Federal tax on telephone messages	5.30
-----------------------------------	------

=====

Total for California income tax return	\$1,316.14
--	------------

<u>Add</u> —California income tax	88.08
-----------------------------------	-------

=====

Total for Federal income tax return	\$1,404.22
-------------------------------------	------------

=====

[108]

(Plaintiffs' Exhibit 10)

FERNAND MERTENS

(Known professionally as Fernand Gravet)

VICTORINE CATHERINE RENOURD MERTENS

1938 CALIFORNIA INCOME TAX RETURNS

Reconciliation of net income reported in attached returns with data filed with Collector of Internal Revenue at Los Angeles for purpose of obtaining compliance certificate (sailing permit) to date of departure of Fernand Mertens from the United States, September 14 1938.

Net income for Federal return, per attached schedule		\$113,735.17
1938 Federal income tax claimed by Collector of Internal Revenue to be "constructively received" from Loew's Incorporated		40,017.41
Gratuities to studio employees		119.28
Dental and skin treatments		775.15
Additional automobile expenses:		
Insurance	\$ 25.68	
Depreciation	112.50	
	<hr/>	
	\$138.18	
<u>Less—One-half thereof allocated to personal use</u>		69.09
	<hr/>	
		69.09
Adjustment of rents:		
Per data filed with Collector	\$591.73	
Per attached schedules	473.40	
	<hr/>	
		118.33
Loss from farm		15.78
		<hr/>

(Plaintiffs' Exhibit 10)

Net income per data filed with Collector of Internal Revenue	\$154,850.21
	=====
	[109]

FERNAND MERTENS
VICTORINE CATHERINE RENOURD MERTENS
1938 FEDERAL INCOME TAXES
Computation of Indicated Overassessments

	Mr. Mertens	Mrs. Mertens
Net income per attached schedule	\$56,867.59	\$56,867.58
Personal exemption	(850.00)	(1,650.00)
Credit for dependents	(800.00)	
	-----	-----
Surtax net income	\$55,217.59	\$55,217.58
Earned income credit	1,400.00	1,400.00
	-----	-----
Normal tax net income	\$53,817.59	\$53,817.58
	=====	=====
Surtax	\$ 9,317.45	\$ 9,317.45
Normal tax	2,152.70	2,152.70
	-----	-----
Total tax	\$11,470.15	\$11,470.15
Previously paid or withheld at source	20,669.80	20,669.80
	-----	-----
Indicated overassessments	\$ 9,199.65	\$ 9,199.65
	=====	=====

[Endorsed]: Case No. 3002. Mertens vs. Rogan.
Pltf. Exhibit 10. Date 3/30/44. No. 10 in Evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. Louis
J. Somers, Deputy Clerk. [110]

Mr. Zeitzius: All right. I shall offer at this time, with the request that we be permitted to withdraw them to make copies or photostats—

The Court: All right.

Mr. Zeitzius: —as one batch, entitled Plaintiffs' Exhibit 11, consisting of the following documents: A, the original letter of November 8, 1940, to the Plaintiff Mertens, Fernand Mertens, from Internal Revenue Agent in Charge, Sullivan, together with the enclosure referred to therein as the "report of the examination" of his income tax return.

The Court: All right.

Mr. Zeitzius: B, a similar letter, with a similar report, addressed to Mrs. Mertens, plaintiff, by the acting internal revenue agent in charge, Sullivan;

C, a letter addressed to Mr. and Mrs. Mertens by [25] Internal Revenue Agent in charge, Martin, dated December 9, 1940;

D, a letter dated February 5, 1941, addressed to Mrs. Mertens by Internal Revenue Agent in Charge, Martin;

E, a similar letter of the same date, addressed to Mr. Mertens by Internal Revenue Agent in Charge, Martin;

F, I think is next, a letter dated February 26, 1941, addressed to Mr. J. R. White, who is referred to in the powers of attorney attached to the stipulation of facts, signed by the head of the technical staff of the Pacific Division of the Office of the Commissioner of Internal Revenue;

G, the next letter, letter of October 17, 1940, addressed to Mr. and Mrs. Mertens.

The Clerk: Is that '40?

Mr. Zeitzius: 1940, signed by the Acting Internal Revenue Agent in charge, Sullivan.

Mr. Mitchell: The defendant has no objection to—by the way, defendant Widow Rogan has no objection to these documents that are just offered, but does not concede the correctness of all of the legal and factual conclusions contained therein.

The Court: All right.

(The documents referred to were marked Plaintiffs' Exhibit 11, and received in evidence.) [26]

[PLAINTIFFS' EXHIBIT 11]

NOTICE

This Is a Copy of the Report of the Examiner of Your Income Tax Return. It Is an Important Document and Should Be Carefully Preserved.

[Crest]

Office of

Internal Revenue Agent in Charge

Los Angeles Division

Phone: MADison 7411.

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

Twelfth Floor, U. S. Post Office and Courthouse

Los Angeles, Calif.

October 17, 1940.

[Stamped]: Referred to JRW No. 66128 Received
Oct 18 1940 Answered JRW 10/22/40 Passed for Filing W

Mr. Fernand Mertens,

Mrs. Victorine Mertens,

c/o Price Waterhouse & Co.,

530 West 6th Street,

Los Angeles, California.

(Plaintiffs' Exhibit 11)

In re: 1938 Income Tax.

Attention: Mr. White.

Sir and Madam:

Reference is made to the 1938 income tax returns and to claims for refund.

The claims are based on the statement that the Collector's office erroneously considered as income "constructively received" in 1938 the amount of \$40,017.41, representing estimated Federal Income Taxes payable by Loew's Incorporated to taxpayers under the terms of a contract.

The statement is made that no obligation existed under the contract to reimburse Mr. Mertens for the taxes until after the close of the calendar year 1938 because it was impossible to determine the amount of Federal taxes on the income until after the close of the taxable period.

From the information attached to the return, it appears that all salary items due to the taxpayers were paid prior to September 14, 1938, date of their departure for France and that at the time of filing the Forms 1040-C, the exact amount of income received and deductions allowable were known so that the tax computed on the return appears to be correct. The amount of the tax demanded by the Collector was loaned by *Lowe's Inc.* and paid by Mr. Mertens.

This office holds, therefore, that the amount of \$40,017.41 advanced to taxpayer is properly includable as income since it was definitely received in the taxable year.

(Plaintiffs' Exhibit 11)

The returns will be recommended for acceptance as filed and the claims will be recommended for disallowance.

Your reply should be forwarded for the attention of Mrs. Flint.

Respectfully,

R. B. Sullivan

Acting Internal Revenue Agent in Charge.

LDF/mhf. [110]

[Crest]

Office of

Internal Revenue Agent in Charge

Los Angeles Division

IT:R

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

Twelfth Floor,

U. S. Post Office and Courthouse,

Los Angeles, California.

Nov 8 1940

[Stamped]: Referred to JRW No. 66129 Received
Nov 9 1940 Answered JRW 11/12/40 Passed for
Filing

Mr. Fernand Mertens,
c/o Price, Waterhouse & Co.,
530 West Sixth Street,
Los Angeles, California.

Sir:

I enclose a copy of the report of the examination of your income tax returns for the year 1938, in connection with

(Plaintiffs' Exhibit 11)

your claim for a refund of \$9,199.65. The report, which has been carefully reviewed by this office, discloses no grounds for reduction of your tax liability.

If You Agree to the conclusions expressed in the report, please so advise this office at your earliest convenience.

If You Do Not Agree to these conclusions, you may file a protest, executed in triplicate under oath, with this office, within 30 days from the date of this letter, stating the grounds for your exceptions. Any protest so filed will have careful consideration and, if you so request, an opportunity for a hearing in this office will be granted you. This office will be pleased to answer any questions which may occur to you in your examination of the enclosed copy of the report.

Should you fail to file with this office within the 30-day period mentioned either an acceptance of the conclusions expressed in the report or a written protest, a recommendation will be made to the Commissioner of Internal Revenue that your claim be disallowed.

Your prompt acknowledgment of the receipt of this letter and related papers upon the enclosed form will be much appreciated.

Respectfully,

R. B. Sullivan

Acting Internal Revenue Agent in Charge.

Enclosures:

Report of examination.

Form of acknowledgment.

AL [111]

(Plaintiffs' Exhibit 11)

Name	Fernand Mertens	Year	1938
Net Income disclosed by return			\$77,425.11
Add: Deduct:			
No change		\$	

Taxpayer's claim is based on the statement that amount advanced by Loew's, Inc., to pay the income tax on 1938 income was not constructively received in 1938.

The claim is recommended for disallowance on the grounds that the amount of \$40,017.41 advanced to taxpayer in 1938 is income for that year since it appears the correct tax was computed on the return filed on September 7, 1938, prior to departure for France.

Net Income as adjusted			\$77,425.11
Less: Personal Exemption	\$	833.34	
Credit for Dependents		266.66	1,100.00
			<hr/>
Balance, surtax net income			\$76,325.11
Less: Interest on Liberty bonds, etc.	\$		
Earned income credit			
(10% of \$14,000.00)		1,400.00	1,400.00
			<hr/>
Balance, subject to normal tax			\$74,925.11
Normal tax at 4% on \$74,925.11	\$	2,997.00	
Surtax on \$76,325.11		17,672.80	\$20,669.80
			<hr/>
Total tax			\$20,669.80
(Withheld by Warner Bros. Pictures)			

(Plaintiffs' Exhibit 11)

Less: Income tax paid at source \$ 1,020.41

Income tax. foreign country 1,020.41

Tax liability as adjusted \$19,649.39

Tax previously assessed: Original \$19,649.39

Subsequent: List

Overassessment allowed 19,649.39

Additional tax—Overassessment \$ None

Date of report: October 23, 1940

L. D. Flint

Internal Revenue Auditor

8-AK

AL [112]

[Crest]

Office of

Internal Revenue Agent in Charge

Los Angeles Division

IT:R

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

Twelfth Floor,

U. S. Post Office and Courthouse,

Los Angeles, California.

Nov 8 1940

[Stamped]: Referred to JRW No. 66128 Received
Nov 9 1940 Answered JRW 11/12/40 Passed for Fil-
ing

(Plaintiffs' Exhibit 11)

Mrs. Victorine Mertens,
c/o Price, Waterhouse & Co.,
530 West Sixth Street,
Los Angeles, California.

Madam:

I enclose a copy of the report of the examination of your income tax returns for the year 1938, in connection with your claim for a refund of \$9,199.65. The report, which has been carefully reviewed by this office, discloses no grounds for reduction of your tax liability.

If You Agree to the conclusions expressed in the report, please so advise this office at your earliest convenience.

If You Do Not Agree to these conclusions, you may file a protest, executed in triplicate under oath, with this office, within 30 days from the date of this letter, stating the grounds for your exceptions. Any protest so filed will have careful consideration and, if you so request, an opportunity for a hearing in this office will be granted you. This office will be pleased to answer any questions which may occur to you in your examination of the enclosed copy of the report.

Should you fail to file with this office within the 30-day period mentioned either an acceptance of the conclusions expressed in the report or a written protest, a recommendation will be made to the Commissioner of Internal Revenue that your claim be disallowed.

(Plaintiffs' Exhibit 11)

Your prompt acknowledgment of the receipt of this letter and related papers upon the enclosed form will be much appreciated.

Respectfully,

R. B. Sullivan

Acting Internal Revenue Agent in Charge.

Enclosures:

Report of examination.

Form of acknowledgment.

AL [113]

Name	Victorine Mertens	Year	1938	
Net Income disclosed by return				\$77,425.10
Add: Deduct:				
No change		\$		
See explanation on report for Fernand Mertens.				
It is recommended that the claim be disallowed.				
Net Income as adjusted				\$77,425.10
Less: Personal Exemption	\$	833.33		
Credit for Dependents		266.67		1,100.00
				<hr/>
Balance, surtax net income				\$76,325.10
Less: Interest on Liberty bonds, etc.	\$			
Earned income credit				
(10% of \$14,000.00)		1,400.00		1,400.00
				<hr/>
Balance, subject to normal tax				\$74,925.10
Normal tax at 4% on \$74,925.10	\$	2,997.00		

(Plaintiffs' Exhibit 11)

Surtax on \$76,325.10	17,672.80	
	<hr/>	
Total tax		\$20,669.80
Less: Income tax paid at source \$ 3,245.92		
Income tax, foreign country		3,245.92
		<hr/>
Tax liability as adjusted		\$17,423.88
Tax previously assessed: Original \$17,423.88		
Subsequent: List		
Overassessment allowed		<u>17,423.88</u>
Additional tax or Overassessment		\$ None
Date of report: October 23, 1940		

L. D. Flint

Internal Revenue Auditor

8-AK AL [114]

[Crest]

Office of

Internal Revenue Agent in Charge

Los Angeles Division

LA:Conf.

DC:FC

Telephone—MAdison 7411

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

Twelfth Floor, U. S. Post Office and Courthouse

Los Angeles, Calif.

December 9, 1940.

[Stamped]: Referred to JRW No. 66684 Received
Dec 10 1940 Answered ✓ JRW Passed for Filing W
Mr. Fernand Mertens,

(Plaintiffs' Exhibit 11)

Mrs. Victorine Catherine Renourd Mertens,
c/o Mr. J. R. White,
530 West Sixth Street,
Los Angeles, California.

Year: 1938

(1-1 to 6-30 & 1-1 to 9-1)

Sir and Madam:

Your protest against the findings of an investigation of your income tax liability for the period above indicated has been referred to the Conference Section of this office for further consideration, since a basis for agreement has not been reached with the representative of the Bureau with whom you have heretofore discussed the proposed adjustments.

In order that you may discuss with the conferee the issues in question, an oral hearing has been set for 10:00 A. M., December 17, 1940, on the 12th floor, U. S. Post Office and Court House, Los Angeles, California.

There are no formalities governing the appearance for conference of taxpayers or full time employees, but any attorney or other representative appearing for or accompanying a taxpayer must present a power-of-attorney authorizing him to act in the matter. Also, any such representative cannot be recognized unless he is enrolled to practice before the Treasury Department in accordance with the provisions of Treasury Department Circular No. 230, and present either a permanent or temporary enrollment card.

In order to assure a full consideration of the issues involved without unnecessary delay, it is urged that you present, at or before the conference, all of the evidence upon which you intend to rely.

When communicating with this office regarding the foregoing, ask for Mr. A. L. Crandall, and when appearing for conference, please present this letter at the Information Desk.

Respectfully,

George D. Martin
Internal Revenue Agent in Charge.

TEC:IA
2-A [115]

[Crest]
Office of
Internal Revenue Agent in Charge
Los Angeles Division
LA:Conf.

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

Twelfth Floor, U. S. Post Office and Courthouse
Los Angeles, Calif.

February 5, 1941

[Stamped]: Referred to JRW No. 67647 Received
Feb 6 1941 Answered ✓ JRW Passed for Filing W
Mrs. Victorine Mertens,
c/o Mr. J. R. White,
Room 820,
530 West Sixth Street,
Los Angeles, California.

Madam:

Your protest dated December 4, 1940 against the adjustments proposed by this office in your income tax liability for the year 1938, as set forth in my letter of November 8, 1940, has been carefully considered but

(Plaintiffs' Exhibit 11)

appears to furnish no grounds for a modification of the proposed adjustments.

In accordance with your request the file is being referred to the Pacific Division of the Technical Staff for hearing. That office will advise you further in the matter.

Respectfully,

George D. Martin

Internal Revenue Agent in Charge.

TEC:EES [116]

[Crest]

Office of

Internal Revenue Agent in Charge

Los Angeles Division

LA:Conf.

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

Twelfth Floor, U. S. Post Office and Courthouse

Los Angeles, Calif.

February 5, 1941

[Stamped]: Referred to JRW No. 67648 Received
Feb 6 1941 Answered ✓ JRW Passed for Filing W
Mr. Fernand Mertens,
c/o Mr. J. R. White,
Room 820, 530 West Sixth Street,
Los Angeles, California.

Sir:

Your protest dated December 4, 1940 against the adjustments proposed by this office in your income tax liability for the year 1938, as set forth in my letter of

(Plaintiffs' Exhibit 11)

November 8, 1940, has been carefully considered but appears to furnish no grounds for a modification of the proposed adjustments.

In accordance with your request the file is being referred to the Pacific Division of the Technical Staff for hearing. That office will advise you further in the matter.

Respectfully,

George D. Martin

Internal Revenue Agent in Charge.

TEC:EES [117]

[Crest]

Office of

Commissioner of Internal Revenue

Address Reply to
Head, Pacific Division, Technical Staff
and Refer to
C-TS:PD
LA:AMS

TREASURY DEPARTMENT
BUREAU OF INTERNAL REVENUE
Pacific Division, Technical Staff
1714 U. S. Post Office & Court House
Los Angeles, Calif.
Feb 26 1941

[Stamped]: Referred to JRW No. 68008 Received Feb 27 1941 Answered JRW 3/1/41 Passed for Filing W

(Plaintiffs' Exhibit 11)

Mr. J. R. White, Room 820,
530 West 6th Street
Los Angeles, California

In re: Fernard Mertens,
Victorine C. R. Mertens,
Los Angeles, California.

Year: 1938.

Sir:

The administrative files in the income tax cases of the above-named taxpayers for the year indicated have been referred to this office for consideration pursuant to your request filed with the office of the Internal Revenue Agent in Charge at Los Angeles, California.

In response to your request a conference has been arranged for 2:00 o'clock, March 4, 1941, to be held at 1714 U. S. Post Office and Court House, Los Angeles, California. At this conference you will be afforded an opportunity to present in an informal manner the facts, arguments, or legal authority in support of your contentions. If practicable, any additional matter not previously submitted should be filed with the Staff at least two days prior to the conference. However, if you intend to rely on new or additional facts of a material nature not heretofore considered by the Internal Revenue Agent in Charge, it may be deemed necessary to return the files to the Revenue Agent in Charge for his consideration.

If for any reason you will be unable to appear for conference on the date fixed above, please advise this office

(Plaintiffs' Exhibit 11)

immediately upon receipt of this letter, stating the nearest date or dates on which you will be able to appear. In your reply please refer to the symbols TS:AMS.

Respectfully,

Virgil Bean

T

Virgil Bean

Head, Pacific Division

Technical Staff

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Pltfs. Exhibit 11. Date 3/30/44 No. 11 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. L. J. Somers, Deputy Clerk. [118]

Mr. Zeitzius: Plaintiffs offer as Exhibit No. 12 the Price-Waterhouse copy of a letter dated December 28, 1938, requesting certain information for use in connection with the 1938 tax liability of the plaintiffs, together with the reply thereto dated January 11, 1939; and we ask permission to withdraw for photostating the carbon copy of Exhibit 12.

The Court: All right. The two documents will be admitted.

The Clerk: Marked Plaintiffs' Exhibit 12.

(The documents referred to were marked Plaintiffs' Exhibit 12, and received in evidence.)

[PLAINTIFFS' EXHIBIT 12]

PRICE, WATERHOUSE & CO.

530 West Sixth Street
LOS ANGELES

December 28 1938

[Stamped]: Signed Copy

[Stamped]: F. L. H. Dec 29 1938

Air Mail

Mr. Fernand Mertens,
2 Rue de Buzenual,
St. Cloud, France.

Dear Sir:

1938 United States and
California Income Tax Returns

At the time we assisted you in determining your United States income taxes in order that you might obtain a sailing permit last September, we explained that it would be necessary to file completed Federal returns

(Plaintiffs' Exhibit 12)

covering the whole of the year 1938. It will be necessary, of course, also to file California income tax returns for 1938. You will recall that Loew's Incorporated advanced to you the amounts necessary for you to obtain your sailing permit, these advances being in the nature of a loan until such time as the definite amount of tax is finally determined.

In order for us to prepare for you and Mrs. Mertens completed returns for the year 1938, it will be necessary for you to furnish us with statements of the 1938 income and expenses of your Paris apartments and of the 1938 operations of your farm and stables so that any profit or loss from these ventures may be included in the completed returns.

Also please inform us of your intentions relative to returning to the United States during 1939, as this will be important in determining the basis on which your returns should be filed, particularly in deciding whether tax liabilities should be determined as resident or non-resident aliens of the United States.

Whether you intend to return to the United States during 1939 may have a material effect upon the amount of your income tax liability. As we explained to you before you left the United States, there has probably already been an over-payment of tax, in which case it will be advisable to file claims for refund of a portion of the tax which you paid when obtaining sailing permits. Our present plan is to forward to you for signature the necessary refund claims at the same time the completed United States and California income tax returns [123] Mr. Fernand Mertens -2- December 28 1938 are forwarded to you for signature, although we will not

(Plaintiffs' Exhibit 12)

file the refund claims until your plans for 1939 are definitely known to us. Please let us know if you have any questions regarding the procedure.

As the completed United States returns will have to be filed by March 15 1939, we would appreciate receiving the information requested as soon as possible. Since we are not certain that you are still at the above address, we will appreciate your informing us as soon as you receive this letter.

Yours very truly,

Price, Waterhouse & Co.

Copy for—

Messrs. Loeb and Loeb

Two copies for—

Loew's Incorporated ✓ [124]

2. RUE DE BUZENVAL

SAINT-CLOUD, S. & O.

Tel. Auteuil 29-53

To Price-Waterhouse Co.

530 West 6th Street

Los Angeles, Calif.

January 11th, 1939.

Gentlemen:

Well received your letter dated December 28, 1938. Will you please find below the informations you are willing to have.

Sincerely yours,

Fernand Gravet

(Plaintiffs' Exhibit 12)

1938 Income

Income:

Rent on 2 apartments
situated in Paris . .
25,000 francs.

Expenses:

Charges concerning heat,
taxes, etc. . .
7,000 francs
25,000
7,000

18,000

Eighteen thousand francs

Concerning the farm:

There is a deficit of six hundred francs (600 francs)
planned as follows:

Income: ten thousand
two hundred francs.
(10,200 francs)
Expenses: ten thousand
eight hundred francs.
(8,200 francs)

Up to now I do intend to come back to the United States
in 1939.

Hoping that you wil find these informations satis-
factory, I remain

Sincerely yours,

Fernand Gravet

The total French income for my wife and me in 1938 is
Seventeen Thousand Francs (17,000 francs).

[Endorsed]: Case No. 3302. Mertens vs. Rogan.
Pltf. Exhibit 12. Date 3/30/44. No. 12 in Evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. L. J.
Somers, Deputy Clerk. [122]

Mr. Mitchell: Defendant waives the objection that the documents are self-serving; that merely goes to the weight, perhaps, of the evidence. But let the record show that the government does not concede the correctness of the statements of either fact or legal conclusions contained therein.

The Court: I think that is understood, that the agents cannot bind you, much less can the taxpayer bind you, by talking back to the agent. [27]

* * * * *

Mr. Zeitzius: What I would like to do is withdraw the original of the letter of January 11, 1939, and substitute this photostat, and then for the Court's easier reading purposes I hand a copy of our transcription of that letter, of which I have already given counsel a copy.

The Court: All right. Just attach it to the exhibit. Mr. Somers, and I can use whichever is more legible. [28]

* * * * *

Mr. Mitchell: Returning for the moment to Plaintiffs' Exhibit 12 that has just been introduced into evidence, I would like very much to see the envelope in which came the letter dated January 11th from the Plaintiff Mertens to Price-Waterhouse & Co., if it is available. I would like [29] to have it produced at this time.

Mr. Zeitzius: No; I have never seen it, and my understanding is that Loew's received it before Price-Waterhouse.

Mr. Mitchell: It is addressed to "Price-Waterhouse & Co."

Mr. Zeitzius: I know it is.

Mr. Mitchell: Then, will counsel stipulate that the letter was received within 30 days after the date it bears by either Loew's or Price-Waterhouse?

Mr. Zeitzius: Yes.

* * * * *

Mr. Mitchell: And it was received by them within a month after the date it bears.

Mr. Zeitzius: Yes; or a copy of it.

Mr. Mitchell: Either that or a copy of it.

Mr. Zeitzius: That is right.

Mr. Mitchell: Very well.

Mr. Zeitzius: Mr. White, take the stand, please. [30]

J. R. WHITE,

called as a witness on behalf of the Plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: J. R. White.

Direct Examination

By Mr. Zeitzius:

Q. Your name is J. R. White?

A. That is correct.

Q. Where do you reside?

A. I live in Glendale, California.

Q. What is your occupation?

A. I am a partner in the firm of Price-Waterhouse & Co., certified public accountants.

Q. And for how long have you been in that capacity?

A. Since July 1st, last. Prior to that time I was the manager in the Los Angeles office of Price-Water-

(Testimony of J. R. White)

house. Since 1935 and for the—and before that, since 1926, I was a junior and senior accountant in that office.

Q. Are you a certified public accountant?

A. I am.

Q. By the Court: Licensed in the State of California, Mr. White? A. Yes, sir.

Q. By Mr. Zeitzius: You were so licensed during 1938? A. Yes, sir. [31]

Q. And ever since? A. Yes, sir.

Q. Are you acquainted with Mr. and Mrs. Mertens, the plaintiffs in this case?

A. I have met them; yes.

Q. Please state when you met Mrs. Mertens, and where?

A. I met Mrs. Mertens in the office of the collector of internal revenue at 939 South Broadway, Los Angeles. I believe it was on June 21, 1938.

Q. Who were present at that time?

A. At that time there was Mrs. Mertens, I believe Mr. Mertens was there. Mrs. Ad Schulberg who was Mr. Mertens' agent, Mr. John Melbourne, an employee of Lowe's Incorporated, Mr. McDonald of the collector's office—we met in front of his desk—and part of the time Mr. Ogden of the collector's office.

Q. Is that Deputy Collector James H. McDonald?

A. I don't recall the initials, but I believe that that is the deputy collector.

Q. Was it the same Mr. McDonald who is in the courtroom? A. Yes; it is.

Q. What was the occasion of you appearing with these people at that time on June 21, 1938?

(Testimony of J. R. White)

A. About ten days prior to that time Mr. Levi of Messrs. Loeb & Loeb called on the telephone and asked if [32] Price-Waterhouse would assist Mr. and Mrs. Mertens in obtaining their compliance certificate and paying the income tax so that they could get a sailing permit. He explained to us that they were here under a contract by which they were to make a picture for a producer, Mervyn LeRoy, I believe the name was, which had been taken over by Loew's; and that under the terms of this contract that—

* * * * *

The Witness: And would we assist in obtaining the sailing permits and prepare the information; and we agreed to do so.

Q. By Mr. Zeitzius: Tell us what happened on June 21st before Mr. McDonald and Mr. Ogden, one or both of them, whoever were present at the time; please state what occurred at that time.

A. We were all introduced and previously I had received certain information as to the amounts of salary paid up to the date of departure, paid to Mr. Mertens up to the date of departure, and the other amounts of income. We presented that income to Mr. McDonald and those items, [33] and computed the tax.

Q. Did you present it in writing, the information, to Mr. McDonald?

A. It was presented informally in writing. We had it in our work sheets, and at that time only Mrs. Mertens was obtaining a sailing permit. The salary had been earned by—we were informed that the salary had been earned by Mr. Mertens, and so we did not present the information to him formally in writing, is my recollection.

(Testimony of J. R. White)

Q. I would like to hand to you what has been marked Plaintiffs' Exhibit 3 and ask you whether you recognize page 3 of the exhibit 3?

A. Yes; I do.

Q. Is that the information you submitted to Mr. McDonald, deputy collector?

A. Yes. I was incorrect in my other statement that it was only in the working papers, because it is typed information which we submitted and I recognize my affidavit on the bottom of it.

Q. You swore to the affidavit and that is the information?

A. In Mr. McDonald's presence; yes, sir.

Q. Did Mrs. Mertens exhibit a passport?

A. Yes. Mrs. Mertens had her passport and exhibited it. She also had a quota number, a certificate of—I have forgotten the exact shape or form of it, but she— [34]

* * * * *

Mr. Mitchell: If there is such a document, your Honor, if there is a passport, it seems to me that passport would be the best evidence.

The Court: I take judicial notice. In the first place, she exhibited not a United States passport; she exhibited a French passport because she, being a native of France, had a French passport. She exhibited a quota [35] number. I take judicial notice of the fact that quota numbers are given, unless a person comes in on what has been known as a visitor's passport or on a presidential non-quota visa. Quotas are fixed by the consul or his representatives in the foreign country, and the person who has

(Testimony of J. R. White)

that cannot surrender it because it is the sole authority for coming into the United States and departing therefrom legally. [36]

* * * * *

A. The conversation developed as to—I think I asked the question of the Collector's Office as to whether Mrs. Mertens had to report and pay tax on half of Mr. Mertens' income before she could get her compliance certificate. This same question had come up in another case with the same deputy collector several months before and was quite keenly in my line at the time. Mr. McDonald, is my recollection, said that since most taxpayers were in the United States under quota numbers, they were regarded as resident aliens, having the status as resident aliens and were residents of California, therefore that Mrs. Mertens would have to pay tax on one half the income to the date of departure before she could get out of the country.

So, on the basis of the information which had been compiled beforehand, the tax was computed and the forms were [37] signed; and then we went down to another window, the cashier's window in the Collector's Office, and Mr. Melbourne, I believe, paid the tax, and that, I think, completed the transactions on that day at the Collector's Office.

Mr. Zeitzius: Before asking you further questions on that conversation, I hand you a paper which I will have marked for identification as Plaintiffs' Exhibit.

The Clerk: 13.

Mr. Zeitzius: 13.

(The document referred to was marked Plaintiffs' Exhibit No. 13, for identification.)

(Testimony of J. R. White)

Q. And ask you—

Mr. Mitchell: May I see the document, Mr. Zeitzius, that you mentioned?

Mr. Zeitzius: Yes, surely.

Q. —whether you recognize this paper which has been marked for identification as Plaintiffs' Exhibit 13?

Mr. Mitchell: We will stipulate that that was issued at the time and delivered to someone.

Mr. Zeitzius: All right. I offer into evidence as Plaintiffs' Exhibit 13 the document identified as No. 13.

The Court: All right.

Mr. Mitchell: What is the date of that, please?

Mr. Zeitzius: For the Court's information I hand you my own personal retained photostated copy. [38]

(The document referred to was marked Plaintiffs' Exhibit No. 13, and was received in evidence.)

[PLAINTIFFS' EXHIBIT 13]

COLLECTOR OF INTERNAL REVENUE,

Los Angeles, California,

Taxpayer's Receipt for Income Tax for the Year 1937.

1040 C to June 30—1938

Cash

Check

Victoria Mertens Gravet

Amount Paid \$3245 92

[Stamped]: Received With Remittance Jun 21 1938
Col. Int. Rev. Los Angeles, Cal. O. G. S.

[Endorsed]: Case No. 3002. Mertens vs. Rogan.
Pltf. Exhibit 13. No. 13 Identification. Date 3/30/44.
No. 13 in Evidence. Clerk, U. S. District Court, Sou.
Dist. of Calif. LJS, Deputy Clerk. [125]

(Testimony of J. R. White)

Q. By Mr. Zeitzius: Did Mrs. Mertens have any United States income for the purpose of this return or at the time of the return June, 1938, about which we were talking?

A. My recollection is that at that time her only United States income was her community, one half of Mr. Mertens' so-called salary, or income of Mr. Mertens.

* * * * *

The Court: Oh, Exhibit 3. I notice that in Exhibit 8 she does state on the reverse of the blank that the amount reported is half of the husband's earnings. [39]

The Witness: Maybe I should explain that all of the information upon which we prepared this return was obtained without independent verification by us. In other words, we prepared the information which we were given.

The Court: There is no objection to you stating what was said at the time, but the objection to the previous answer was that you were stating a conclusion, not what was said at the time either by Mrs. Gravet or yourself as one of the four parties present on behalf of the taxpayers. That is the only objection, Mr. White.

The Witness: I should put it, then, I was informed that the only income Mrs. Gravet had in the United States was her community one-half of the income.

Q. By the Court: And that was so stated at the time?

A. And that was so stated at the time.

The Court: All right.

Q. By Mr. Mitchell: By whom?

(Testimony of J. R. White)

A. By Mr. Gravet, by Mrs. Gravet, and by the people at Loew's, and in the telephone conversation with the people from Warner Brothers.

Mr. Mitchell: I still move that all that portion of the answer to what they said about it being community property be also stricken as a conclusion of the plaintiff and hearsay as to anyone else, what anyone else said.

The Court: No. I think the portion relating to what [40] was verified on the telephone may be stricken; but I will allow the statements that were made to the agent at that time during the discussion to remain.

Q. By Mr. Zeitzius: Did she state whether or not she had any income from sources outside the United States in this conversation in June?

A. Yes. They informed me that they had some income from an apartment in Paris, I believe it was, and also that they operated a farm in France as a business venture from which they had either a profit or a loss. They did not know at that time whether they had a profit or a loss, at least, they told me they did not know at that time.

Q. Are the figures shown on page 3 of Plaintiffs' Exhibit 3 the figures with respect to the French income estimated as of June in 1938?

A. That is right. Mr. Mertens told me that the flats in Paris would bring in 34,000 francs for the year 1938; and from that information I computed the rent for six months by conversion at the published exchange rates in The Wall Street Journal as of June 30.

Mr. Zeitzius: That is the black exhibit, your Honor, exhibit 3, page 3.

The Court: Which one is that one?

(Testimony of J. R. White)

Mr. Zeitzius: The black exhibit 3, page 3.

The amount of French income is shown here, is it?

A. It is 34,000 francs. [41]

Q. No. I mean in American dollars.

A. That would be \$948.18 for the full year, and for the six months, the amount of \$474.09 was included in this computation.

Q. Was anything asked by the deputy collector with respect to the place of marriage of the individuals, of the plaintiffs?

Mr. Mitchell: Excuse me. What was that question?
(The question was read.)

A. I do not recall whether that was asked by the deputy collector or not.

Q. By Mr. Zeitzius: Was anything said about or in the presence of the deputy collector concerning where they were married? A. Yes. I—

Mr. Mitchell: By whom?

Mr. Zeitzius: By any of the parties in the presence of the deputy collector and in the presence of either of the plaintiffs.

A. Yes. I reported to the deputy collector that Mr. Mertens was a citizen of Belgium, or a subject of Belgium, Mrs. Mertens was a citizen of France; and that I had been told by them that they were married in France.

Q. Were Mr. and Mrs. Mertens present when you stated to the deputy collector that you had been told by them?

A. Yes: they were present at all times on this [42] occasion on the visit to the office.

(Testimony of J. R. White)

Q. Was anything said with respect to the community property goods law or community goods law either of France or Belgium?

A. Yes. Mr. McDonald and I and Mr. Ogden had some discussion about the fact that we would not have to get a—

Mr. Mitchell: Just a moment. I move that the whole conversation be testified to rather than the conclusions.

The Court: He is doing it. Go ahead, state it. State what was said rather than your conclusions.

A. That we would not have to worry about whether or not they had been married under the community goods law of France or not.

Mr. Mitchell: Who said this?

A. Well, Mr. McDonald and Mr. Ogden and I had this discussion, the reason being that on this previous case I referred to, before they would let these other people who were non resident aliens out they had to get a wire from Washington recognizing the community of goods law of France before they would let these other people out of the country. And on this case we discussed that we would not have to get such a ruling because of the fact that these people were in the United States under a quota number, and therefore we would not have to worry about whether the law under which they were married was community property law, although they both stated that they were married under a community property law. [43]

* * * * *

Q. By Mr. Zeitzius: Was there anything said by Mr. or Mrs. Mertens on June 21, 1938, as to what her

(Testimony of J. R. White)

plans were for the future so far as coming back to the United States or not coming back is concerned?

* * * * *

A. I only say Mrs. Mertens on one day.

Q. And that is the conversation we are talking about?

A. On June 21, and the whole time I saw her was in the Collector's Office.

The Court: All right; go ahead, then.

A. And at that time she stated in the presence of all of us who were there, except possibly Mr. Ogden was not there at the time, that she was going back to France and [49] that she expected to return in three or four months.

Q. By the Court: Ogden was not there because, you know, you said one or the other kept coming in and going out.

A. That is right.

Q. Is that the idea?

A. That is right. We started with Mr. McDonald and then we did—

Q. By the way, how long did the conference last, several hours?

A. It was probably about two hours.

Q. Two hours. A. In the morning.

The Court: All right.

Q. By Mr. Zeitzius: Was anything said by you or on behalf of the plaintiffs at that time to the effect that she did not have to report any income?

A. Well, I think I discussed that with Mr. McDonald purely as a theoretical matter; and they said, "No; as long as she is"—he said, "As long as she is a resident and regarded as a resident of California, we won't give her the permit unless she pays tax on half of the income."

(Testimony of J. R. White)

Q. Was anything said by either deputy collector to the effect that she was a resident alien?

A. Well, yes. The deputy collector's office said that under the—told us that under the rule, that when they were [50] in the—

Mr. Mitchell: I would like to have the person who made that statement there.

The Court: Who made that statement, Mr. McDonald or Mr. Ogden?

A. Mr. McDonald told us that it was the rule of the Treasury Department, the collector's office, that when a person was in under a quota number and unless there was some extenuating circumstance, they were regarded as residents; and that, as a resident, she would have to report on half the income.

Q. By Mr. Zeitzius: Did there come a time when you thereafter had occasion again to go to the Collector's Office on behalf, this time, of Mr. Mertins?

A. I went to the Collector's Office on several occasions after that. Towards the end of August, and finally on September 7, in 1938. The reasons for these visits were that Mr. Mertens could not leave when Mrs. Mertens did because he had not completed his picture, and in the interim I visited him and obtained from him information to complete the tax data that was required at the time he was going to leave. This information was finally gotten together about, I imagine, the 25th or 26th of August, at which time Mr. Leon Levi of Loeb and Loeb and I went down to the Collector's Office and presented this information to Mr. McDonald and Mr. Ogden and discussed it with them. They took parts of the [51] information and went upstairs, and said they wanted to go and talk with

(Testimony of J. R. White)

the internal revenue agent's office about it. After some length they came back and told us they had discussed it with Mr. Maddux, who was one of the chiefs of the office of the internal revenue agent in charge, and that the compliance certificate would not be issued exactly on the basis of the information that we had presented.

Then we had further discussion with them and found out on what basis they would issue the compliance certificate; and then we made arrangements to call on September 7th and pay the tax and obtain the compliance certificate.

Q. When you went there did you say you went there on August 30, 1938, or did you say the latter part of August?

A. Well, we were first there about August 25 or 26.

Q. And then when did you next return after the 25th or 26th of August?

A. Then we went down on August 30th.

Q. On August 30th you say Mr. Levi was present and Mr. McDonald?

A. Mr. Levi was present, Mr. McDonald, and Mr. Ogden; and we were with Mr. McDonald and Mr. Ogden together for a few minutes, but most of that time we were with Mr. Ogden.

Q. On that occasion neither of the plaintiffs were present, is that correct? A. That is correct.

Q. Please state what occurred in that conversation.
[52] Oh, before asking you that, at that time did you hold a power of attorney from Mr. and Mrs. Mertens, referred to as Exhibits A and B to the stipulation of facts?

(Testimony of J. R. White)

A. Yes; I had power of attorney from both of them, dated the 24th of June.

Q. You appeared pursuant to that power of attorney, did you, on behalf of Mr. and Mrs. Mertens on August 30th?

A. Yes.

Q. In that connection I ask you to examine what has been marked Plaintiffs' Exhibit 5 and kindly state whether the schedule of figures attached thereto—well, do you know where that schedule of figures of which that is a photostat came from—from where they came?

A. This schedule was prepared in our office and was sent to the Collector of Internal Revenue, or rather, it was delivered to the Collector on September 7th with our letter of that date, a letter from our office on that date.

Q. When you say the "Collector," to whom was it delivered?

A. I do not recall whether this was delivered to Mr. Ogden or to Mr. McDonald; one of the two.

Q. Prior to the delivery of this had you made any report or reduced to writing anything that occurred on August 30th at the Collector's Office?

A. Yes. After August—after the visit of August 30th, I wrote a letter to Loew's Incorporated summarizing what had [53] taken place and instructing them as to what arrangements we had made with the Collector's Office for obtaining the sailing permit.

Q. Do you have your retained office copy of the letter of August 30, 1938?

A. Yes; I do. [54]

* * * * *

Q. By Mr. Zeitzius: Now coming back to the August 30th transaction, was there any discussion with

(Testimony of J. R. White)

respect to whether the income at that time must be reported by one or both plaintiffs?

* * * * *

A. Well, August 30th I think that we were there probably an hour and a half. [57]

* * * * *

The Court: Then, I would not ask the question in that leading form in which you ask it. I would merely ask him if there was any discussion as to the manner of payment other than as he has already testified.

Mr. Zeitzius: All right; I shall adopt that question.

The Court: All right.

A. Yes. Following our conversation—we reviewed our discussion which we had had in June, and were told by Mr. Ogden, I believe it was, that the Collector's Office would not issue a sailing permit to Mr. Mertens until Mrs. Mertens' tax had also been paid; also, that they would not issue a sailing permit unless and until the tax that was paid was computed on income which included the tax which was to be paid.

The Court: That is, over and above what she paid in June; is that what you are talking about?

A. That is correct.

Q. \$3,245.92?

A. That is correct; the tax in June, computed on the basis of earnings up until June 25th.

The Court: Up to that time, I see. [58]

A. And the tax in August was computed on earnings until the end of the picture.

The Court: All right.

(Testimony of J. R. White)

Q. By Mr. Zeitzius: In computing the tax liabilities in September, 1938, were the returns made on the basis of the entire year from January 1, 1938, to September 1 or some nearby date?

Mr. Mitchell: Oh, I will stipulate that the returns speak for themselves and they do not include the whole year, only to the date of departure.

Mr. Zeitzius: Will you also stipulate that the June return was superseded by the wife's return marked Plaintiffs' Exhibit 8, the one filed September 7, 1938?

Mr. Mitchell: Assuming that the wife's return in June was valid, it was superseded by the second return, upon the assumption that the second return of the wife was valid, yes; that the period covered by the June return is also covered by the September return.

Mr. Zeitzius: That is correct.

The Court: On the face of this Exhibit 8 it shows that the taxable period was January 1, 1938, to September 1, 1938, so that this, of necessity, included the partial return which had been turned in in June. [59]

* * * * *

Mr. Zeitzius: I do not think I asked the witness whether or not with respect to Plaintiffs' Exhibit 5 he knows who produced pages 3, 4, 5, and 6, the last four pages of Exhibit 5.

Mr. Mitchell: Who produced those?

Mr. Zeitzius: Who produced the originals of those pages.

Mr. Mitchell: I will stipulate that Mr. White produced them.

(Testimony of J. R. White)

Mr. Zeitzius: That the witness produced them to the deputy collector at the time, on September 7.

Mr. Mitchell: 7th?

Mr. Zeitzius: 1938.

Mr. Mitchell: On behalf of his principals.

Mr. Zeitzius: On behalf of each of the plaintiffs.

Mr. Mitchell: That is right. [60]

* * * * *

Q. By Mr. Zeitzius: Was the same information submitted with respect to Victorine's return, or what is the situation as to that?

A. One letter was submitted and one set of statements, and it is my recollection that it was marked on the back of the wife's return that the income was as shown by a detailed schedule, a reference was made just to the detailed schedule. [61]

* * * * *

Q. By Mr. Zeitzius: Mr. White, I think I forgot to ask you whether there was any conversation with respect to the payment or manner of the payment of the tax in your discussion of August 30th at the Collector's Office.

A. You mean as to whether it should be paid in cash or cashier's check?

Q. That and where the cash should come from. [62]

* * * * *

A. I do not believe there was any conversation as to what means had to be used to pay the tax, whether it had to be cash or a check or not on August 30th.

Q. By Mr. Zeitzius: Was there any conversation with respect to whom or with respect to how the money

(Testimony of J. R. White)

would be obtained to pay the taxes that would be found due by Gravet and his wife?

A. There was a conversation—there was a controversy between Mr. Ogden of the Collector's Office, on one hand, and Mr. Levi and myself, on the other hand, as to the amount of income that had to be reported, and that controversy involved the question as to whether the tax was to be paid by Gravet or to be paid by Loew's. And when Mr. Ogden, on behalf of the Collector's Office, insisted that the tax be paid in the manner in which it finally was, Mr. Levi told him definitely that if that was the case, Loew's was not going to pay the tax but would only advance the money to Gravet or on Gravet's behalf. If that is what you have reference to in your question? I don't quite understand it. [63]

* * * * *

Q. By Mr. Zeitzius: What, if anything, was said with respect to the manner of computing the tax and by whom was [64] it said on August 30th?

A. On August 30th Ogden informed us that he had discussed this question with Maddux, of the agent's office, and that the information that had previously been filed would not be accepted in its whole; that, I believe, three changes would have to be made. One was that they would disallow a deduction for gratuities to studio employees of approximately \$119.00 and that the agent's office would not allow a deduction for—I think it was skin treatments, some type of medical treatments, of about \$775.00; and that they would insist that they include in income the amount of tax which would be paid, the amount of tax which would have to be paid before the sailing permits were issued. Mr. Levi told them, called

(Testimony of J. R. White)

their attention to certain decisions and rules and his interpretation of the legal aspects of the contract, and explained to Mr. Ogden the contention that Loew's was not required to pay Gravet's taxes until after they had been finally determined for the full year 1938, and the legal contention that they could not be determined until after December 31, 1938, no matter how many times or whatever was done in the meantime in the way of issuing sailing permits. Mr. Ogden—and I don't recall how much part Mr. McDonald took in this. He was there sometimes, but on this occasion he was not there as much as Mr. Ogden. Mr. Ogden said that the Collector's Office would not absolutely deny this position, but that in order to protect the revenues of the country they would [65] insist upon such treatment before they would issue the sailing permit.

Then I asked what they meant by the tax on the tax, what they meant by the amount of tax to be included; did they mean the first computation of tax, in other words, the income before, in taking up this item, was—if I can refresh my memory here on the figure, I can tell you the exact figure.

Q. Yes; you may.

Mr. Mitchell: May I ask, is the witness referring to working notes that he had before him at the time to refresh his memory?

A. I will. The income for each before this adding back any tax was \$56,954.19. And I asked if they—and the tax computed on that for each was \$11,692.97, of which \$1,020.41 had been withheld at the source by Warner Brothers and as such was not an issue in our controversy in the Collector's Office. So I asked whether

(Testimony of J. R. White)

they meant they should include this \$10,672.56 for Mrs. Mertens and \$11,692.97 for Mr. Mertens. I was told—Mr. Levi was with me—and was told—

Mr. Mitchell: By Mr. Ogden?

A. By Mr. Ogden, and was told that that would not be sufficient; we would not only have to include that amount in the income, but we would have to include the tax, also the tax that resulted from the inclusion of that amount, and keep that going on until the additional tax that had to be [66] computed by putting in the additional amount was less than one cent—less than half of one cent, then there would be no further computation.

It was after that, after we were informed of that, that Mr. Levi stated to Mr. Ogden that if that occurred, then Loew's would definitely not pay the tax, because they believed that this was not the correct way to compute it and that they felt that if it was incorrectly computed that they had no obligation, that Loew's had no obligation to pay Mertens for tax which was illegally computed.

Those are not the exact words but that is my best recollection on that part of the conversation. So then, I have forgotten whether Mr. Levi or myself, asked the Collector's Office to please compute the amount of tax that they wanted us to pay so we could get the sailing permit, because we had been instructed by Loew's, or I had, at least, by Loew's that it was absolutely necessary to get Mr. Gravet his sailing permit so he would be happy and could get out of the country and be back and be ready for another picture.

And Mr. Ogden expressed his inability to make the computation. And after a considerable discussion, I volunteered to make the computation which required the use

(Testimony of J. R. White)

of an algebraic formula. And I went back to my office and made the computation, after which I developed the schedule which was included with our letter of September 7th to the Collector's Office and the copy of which was sent to Loew's [67] Incorporated with our letter of September 30th.

Q. By Mr. Zeitzius: You mean August 30th?

A. I mean August 30th. I am sorry.

The Court: To what exhibit is that attached? What exhibit in the file is that computation attached?

* * * * *

Mr. Zeitzius: I think, actually, for the purpose of saving paper, there is only one and it is attached to Plaintiffs' Exhibit 5.

* * * * *

The Court: Yes. I have the letter here, the letter of September 7th, is that correct?

Mr. Zeitzius: Yes; that is right, that is with it.

The Court: And the material that follows with it?

The Witness: If I am correct, that computation is not in that letter. The amount shown on that letter and described is an amount required by him, that \$40,000 item there, your Honor. [68]

The Court: I don't know what you are talking about.

Mr. Zeitzius: Page 3 of Exhibit 5, your Honor.

The Witness: "1938 Federal Income Tax Claimed by Collector of Internal Revenue to be 'Constructively Received' from Loew's Incorporated." That is the amount of \$40,017.41. That is on page 3.

Mr. Zeitzius: Page 3.

(Testimony of J. R. White)

The Witness: Right there. (Indicating to the Court on exhibit.)

The Court: Oh, yes.

A. And the computation on that is not in this exhibit, but is in the working papers that I prepared at the time, and here is the formula.

The Court: I have a son who is a mathematician who would understand that, but I may not.

Mr. Mitchell: If the Court please, I do not pretend to be able to follow that, either, and for that very reason may I suggest that plaintiffs' counsel have a photostat or a copy made to introduce in evidence.

The Court: Explain in simple terms, leaving out those sines and cosines, formulas so dear to algebraists, what, reduced to its ultimate form, the formula was.

A. The formula involved guessing in which bracket the income would fall, in which tax bracket the income would fall. If you make a wrong guess you had to do it over, but if you made the right guess, why, you get it the first time. [69] Then you simply take the basic income, plus the application of the tax rate on the right bracket, and you had to subtract \$30 for California Unemployment Insurance, \$30 for Old Age Pension Insurance, and apply the surtax rate and the normal tax rate. Once you had the answer, it could be very readily proved, because, by including the amount in the income and then computing the tax, the tax would have to come out to be the amount which was included.

In this case there was \$301.78 worth of tax which I computed as being the tax on the French income, and on the bottom of this exhibit, in my handwriting, I made a little tabulation in order to prove to Mr. Ogden that the

(Testimony of J. R. White)

amount of \$40,017.41 was the amount that he insisted that be included in the income, and that is how this amount was arrived at.

Q. You took the amount he gave you and then you worked backwards, is that the idea? A. No.

Q. Worked back from it?

A. No. 'He told me the theories that he wished applied.

Q. Oh, the theory, I see.

A. Then I worked out the amount by this algebraic formula. It is self-proving and self-evident after you have the answer.

The Court: I see. All right.

Q. By Mr. Zeitzius: Can you state how many taxes [70] are pyramided in that \$40,017 item?

A. Not how many, but there are—they keep pyramided until the tax is less than one cent. In other words, until the additional tax from each computation is less than one cent, then you stop.

Q. When after August 30th did you next call at the Collector's Office?

A. At 10:30 in the morning of September 7th.

Q. Who were present with you at that time?

A. Mr. Mertens, Mr. John Melbourne of Loew's Incorporated.

Q. And who were present on behalf of the Collector?

A. We called at Mr. McDonald's office and I believe he referred us to Mr. Ogden, and we went to Mr. Ogden that morning.

(Testimony of J. R. White)

Q. Do you recall whether or not Mr. McDonald appeared on the scene?

A. Mr. McDonald was there and was with us part of the time. I can't recall just how much of the time he was with us.

Q. Will you please state whether anything was said at that time? What did Mr. Gravet say at that time? Do you recall the conversation on his part?

A. I think his principal conversation was concerned with the—it is my recollection of his principal conversation that it was concerned with the complications and [71] difficulties of getting his taxes paid and getting out of the country.

Q. What was said by you and Mr. Levi? Will you please state as much of the conversation as you can remember and what you did on that occasion?

A. As I recall it, I introduced him to Mr. McDonald, Mr. Ogden, and presented—

Mr. Mitchell: Excuse me. Introduced Mr. Levi?

A. No; Mr. Gravet.

Mr. Mitchell: Oh.

A. Mr. Gravet to Mr. McDonald and Mr. Ogden, and we sat down with them and I handed them this letter which is attached to that form, and the schedules.

Q. By Mr. Zeitzius: You mean the letter of September 7th?

A. The letter of September 7th.

Mr. Mitchell: Attached to Exhibit 5?

The Witness: I presume that is the number.

(Mr. Zeitzius handing exhibit to witness.)

(Testimony of J. R. White)

A. And from that Mr. Ogden filled in the forms 1040C. After that Mr. Gravet exhibited his passport.

Q. By Mr. Zeitzius: To the deputy collector?

A. Yes. And—

Q. Did you see it?

A. Yes; I saw his passport. I saw him handing it to him. I did not handle it or look at it closely myself. [72] And he was asked when he was leaving and on what steamship; and he told them that he was leaving from New York.

After the form was completed and filled out, Mr. Ogden was satisfied as to the computation and he asked me to prove that the \$40,000 item was the item that he wanted in the income, and I made that tabulation on the bottom to do that, then we proceeded to the cashier's window and when we got to the cashier's window we found, to my chagrin, that we had cashier's checks which I had requested them to bring, and cash, and the collector would not accept the cashier's checks, and so they had to be sent back to the bank and cash obtained to pay the tax and get the sailing permit. And while that was done I sat in the lobby with Mr. Melbourne and Mr. Mertens and discussed with him the whole situation.

Q. I hand you Plaintiffs' Exhibit 6 and ask you whether you were present when that return was made out?

A. Yes; I was.

Q. In whose handwriting is that return prepared? That is Exhibit 6.

A. I am unable to say. I do not recognize the handwriting as anyone that I know. I recognize Mr. Ogden's signature, I think, but I don't know the handwriting.

(Testimony of J. R. White)

Q. By the Court: You say Mr. Ogden prepared the statement. I notice he also verified it—I mean, took the oath of the taxpayer on it.

A. Yes. I am uncertain whether Mr. Ogden actually [73] wrote it out, or whether Mr. McDonald, or whether a girl did, Mr. Ogden's assistant, actually wrote it out.

Q. He took the taxpayer's affidavit? A. Yes.

Mr. Mitchell: I am informed by Mr. McDonald that he believes this is the handwriting of Mr. Ogden. I will so stipulate.

Mr. Zeitzius: All right.

Mr. Mitchell: That is, the longhand entries.

Mr. Zeitzius: That is right; all the longhand writing and entries on Plaintiffs' Exhibits 6 and 8.

Mr. Mitchell: That is right.

Mr. Zeitzius: It is agreed between counsel are in the handwriting of Mr. Ogden, whose name appears on the back as the deputy collector who took the oath of the taxpayer.

Q. In the presence of the deputy collector on September 7th was anything said or were any questions asked concerning Mr. Mertens' intent as to the future, as to whether he would or would not return to the United States?

A. I don't recall any definite question was asked him at that time. I do know that he had told me that he intended to come back. [74]

* * * * *

Q. Was the question of Mr. Mertens' residence discussed on September 7 at the office of the deputy collector?

(Testimony of J. R. White)

A. No. On September 7th all that was necessary to do was to file the information and pay the tax, and those things had all been discussed and agreed upon before.

Q. You mean by the earlier meeting of August 30th?

A. At the earlier meeting of August 30th, at the meeting in June and at the meeting at the times that we had been there. Mr. Levi and I were down there on August 25th or 26th or approximately then. [75]

* * * * *

Q. By Mr. Zeitzius: Did you ever have any conversation with Mr. Mertens with respect to his intent to return or not to return to the United States, say, in the month of August or September, 1938?

A. Not in the month of September, but Mr. Mertens told—

Q. Do not say what occurred. Did you ever have any conversation in that respect? A. Yes.

Q. When was such a conversation had by you with him? A. June, 1938, and in August, 1938.

Q. Who were present at the conversation occurring in June?

A. In June it was in the Collector's Office and Mr. McDonald was present and Mr. Mertens was present, Mrs. Mertens was present, Mrs. Schulburg was present, Mr. Melbourne was present.

* * * * *

Q. By Mr. Zeitzius: What about the conversation concerning that matter in August? Who were present at that conversation and when was it? [77]

A. Mr. Levi and I were present—

Mr. Mitchell: What was the date of this?

(Testimony of J. R. White)

Mr. Zeitzius: I am asking him when in August.

A. It was around the—can I refer to my excerpt I made from my notes?

The Court: Any notes that help you to refresh your recollection you may refer to.

* * * * *

A. On the 16th or 17th of August.

Mr. Mitchell: 16th or 17th.

A. And Mr. Levi and I called at the studio and got Mr. Mertens off his set where they were shooting, finishing the picture "The Great Waltz," and went with him to his dressing room, where he furnished me with the information to compile for submission to the Collector's Office. At that [78] time I asked him whether his intention was to return to this country and he said that it was, and he expected to be gone for a few months and that he might make one picture in France before he came back to this country, and he expected to come back and make another picture for Loew's.

Q. By Mr. Zeitzius: Do you know whether—

Q. By the Court: I gather Mr. Gravet speaks English?

A. Yes; he speaks English.

Q. By Mr. Zeitzius: Do you know whether he had been in the United States, from your talk with him at that time or earlier, whether he had been in the United States prior to 1938?

A. In June, on the occasion of our visit to the Collector's Office, he told me that he had been in the United States in 1937, I believe it was, on a visitor's permit, and that he and Mrs. Mertens had both left the country and

(Testimony of J. R. White)

that they had come back in under the quota. I also believe that—the best of my recollection is that Mr. McDonald showed me a card in the Collector's Office which indicated that he had obtained a sailing permit at an earlier date.

Q. I next ask you whether you prepared the claims for refund which are in evidence as Plaintiffs' Exhibits 9 and 10?

A. Yes; I prepared both of these claims.

Q. Do you mean both for Mr. and Mrs. Mertens?

A. Yes; one for each. [79]

Q. And did you mail or cause them to be mailed to France for their signatures? A. Yes.

Q. Were they in due course returned to you, signed by Mr. and Mrs. Mertens, respectively?

A. Yes. [80]

* * * * *

Q. By Mr. Zeitzius: After the filing of the claims for refund were there any conferences which you attended with the revenue officials?

A. Yes. I attended a conference with Mrs. Flint, I think it was, of the agent's office, and I attended a conference with representatives of the technical staff.

Q. At the conference with the agent's office what was discussed, the contents of what document?

A. The whole case was discussed and the contents of [95] the claim for refund and returns and the contentions were made on behalf of the taxpayer.

Q. What occurred at the conference before the technical staff?

A. The same as before the agent's office. Neither the agent's office nor the technical staff would concede the

(Testimony of J. R. White)

principle point at issue; and they told us that if we would concede the principle point at issue, they would be willing to allow the other points, which were immaterial, I mean in amount, they were very small in amount; but if we were not willing to drop the main claims, why, they might as well stand on the whole thing and not allow anything, and simply deny the whole claim.

Mr. Mitchell: I move that the last answer be stricken on the ground that it is immaterial.

The Court: No. It just merely confirms the letter, that they were not conceding anything. After all—

The Witness: That is right.

The Court: All right.

Q. By Zeitzius: Did these Internal Revenue officials at these conferences question the items of deductions in the refund claim schedule?

A. As far as gratuities to studio employees were concerned, they admitted that those would be allowable, because there had been a change in the rulings of the Department between the time the return was filed and the [96] claims were considered. As far as the additional depreciation on the automobile and the adjustments for rent and the loss from the farm, those were all right. They did not at that time see fit to allow the dental and skin treatments, but they said, to settle the case they would.

Q. Was anything said with respect to the propriety of treating them as resident aliens for the calendar year?

A. No. That question was never raised until after the returns were filed, as far as I know.

(Testimony of J. R. White)

Q. Was anything said with respect to whether or not they were entitled to use the calendar year basis as shown in the refund claim?

A. Yes. They said that if you will drop the main point, we will let you have all these little points to settle you, because the amount of tax involved was so small that it was an easy settlement.

Q. So that would you say the schedule based on the entire year, that is, the items making up the schedule attached to the refund claim for the entire year, was before the agent's office and before the technical staff, and that they did not question the correctness of the amounts as amounts which they purported to be?

Mr. Mitchell: I object to that question as highly leading.

The Court: Well, it is a leading question. He has already stated what they said and it is evident—the first [97] part I will allow, as to whether these additional amounts computed on the basis of the whole year were before them. To that extent I will let him answer that question. But the second part calls for a conclusion. Go ahead.

A. The entire claim was before the people of the technical staff.

Q. By the Court: And various items were discussed?

A. The various items, all of the items, were discussed.

Q. But you would not budge and they would not budge, so you got nowhere?

A. That is right.

Mr. Zeitzius: If it is understood that the purport of the witness' testimony is, then, that the revenue officials

(Testimony of J. R. White)

at both of these conferences did not question the correctness of the amounts as amounts—

The Court: Well, I think that is evident from the testimony.

Mr. Zeitzius: —then I have no further questions from him this afternoon.

The Court: All right. You have not completed your examination of him?

Mr. Zeitzius: Not quite. When I go through these things I may have some odds and ends. [98]

* * * * *

Mr. Zeitzius: Before proceeding with the witness, I would like to call on Mr. Mitchell and ask if he has government's copy of a letter dated October 22, 1940, to the Internal Revenue Agent in Charge, from Price-Waterhouse, apparently "J. R. White" are the initials at the bottom of it, relating to Mr. and Mrs. Mertens' 1938 income tax. The government should have the original in its possession.

Mr. Mitchell: On that one, Mr. Zeitzius, I will waive the production of the original and stipulate that this is a true copy that the government has received.

Mr. Zeitzius: All right. Then I will ask with respect to whether he has government's copy, retained copy, the letter dated September 30, 1940, addressed to the Internal Revenue Agent in Charge?

Mr. Mitchell: September 30?

Mr. Zeitzius: Yes; by Price-Waterhouse and Co.

Mr. Mitchell: Yes. I will waive the production of the original of that, too, and stipulate that it was received by the addressee. [103]

* * * * *

(Testimony of J. R. White)

Mr. Zeitzius: At this time I offer into evidence the letter of September 30, 1940, addressed to the "Internal Revenue Agent in Charge" by Price-Waterhouse, the production of the original of which has been waived by the parties.

Mr. Mitchell: I would suggest, first, the letter to which this is a reply be introduced so that they will be understandable, they will be chronological, and therefore in understandable order.

* * * * *

Q. By Mr. Zeitzius: Mr. White, do you have in your possession a letter from Internal Revenue Agent George D. Martin, dated September 16, 1940, addressed to Loew's Incorporated? [104]

A. No, sir. I have a copy, what purports to be a copy.

* * * * *

Mr. Zeitzius: All right. I ask that these be marked for identification, letter dated September 16, 1940, from Internal Revenue Agent in Charge George D. Martin to Loew's Incorporated.

The Clerk: 15 for identification, a copy.

(The document referred to was marked Plaintiffs' Exhibit 15, for identification.)

(Testimony of J. R. White)

[PLAINTIFFS' EXHIBIT 15]

C TREASURY DEPARTMENT
O INTERNAL REVENUE SERVICE
P LOS ANGELES, CALIF.
Y

September 16, 1940

Loew's Incorporated,
10202 Washington Blvd.,
Culver City, Calif.

In re: Fernand Mertens

Sirs:

This office has information to the effect that in 1938 an income tax was paid to the Collector of Internal Revenue and that in 1939 reimbursement was made by you in accordance with a contract.

It is requested that you state the amount which was paid to Mr. Mertens in 1939 and the date of payment.

Your reply should be forwarded to this office for the attention of Mrs. Flint.

Respectfully,

(Signed) George D. Martin

Internal Revenue Agent in Charge

LDF:hms

[Endorsed]: Case No. 3002. vs.
Pltf. Exhibit 15. Date 3/31/44. No. 15 Identification.
Date 3/31/44. No. 15 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. L. J. Somers, Deputy Clerk. [130]

(Testimony of J. R. White)

Mr. Zeitzius: And I hand that letter so marked to the witness, and ask him whether he received that, the original or a copy thereof; if so, whether he made a reply thereto?

A. On September 25, 1940, we received a—by “we” I mean Price-Waterhouse & Co.—received a copy of a letter identical with this. [105]

* * * * *

A. —from Loeb & Loeb, with the request that we answer it, which we did by a letter dated September 30, 1940, addressed to “Internal Revenue Agent in Charge.”

Mr. Zeitzius: I ask that this letter which is dated September 30, 1940, addressed to the “Internal Revenue Agent in Charge” from Price-Waterhouse & Co., be marked as Plaintiffs’ Exhibit 16, for identification.

The Clerk: So marked for identification.

(The document referred to was marked Plaintiffs’ Exhibit 16, for identification.)

Mr. Zeitzius: I hand you what has been marked for identification Plaintiffs’ Exhibit 16 and ask you if that is a true copy of the reply which you made?

A. That is a copy that agrees with the retained copy that we have of the letter, so I assume it is a true copy. [106]

Mr. Zeitzius: I offer into evidence as Plaintiffs’ Exhibit 15 the letter of September 16, 1940, marked for identification and identified by the witness, as Exhibit 15.

Mr. Mitchell: We object to it only on the grounds that it is wholly immaterial and it merely encumbers the record. While it does relate to these taxpayers, I think the witness can testify that the revenue agent was misinformed, so

(Testimony of J. R. White)

that it is of no help to the Court whatever, either Exhibit 15 or Exhibit 16 for identification.

Mr. Zeitzius: I think that that, your Honor, taken together with Exhibit 16 which I shall offer next, is clearly a part of the case. It shows the position as supposedly maintained that this was a loan and not constructively received, the main amount in question here of some \$40,000, and I submit that it shows what was before the revenue officials and the position taken by the parties here at all times.

The Court: I will overrule the objection. This has bearing upon the relationship between the parties and the agreement, which is Exhibits 1 and 2, under which the method of payment of the taxes was arranged. [107]

* * * * *

Mr. Zeitzius: I next offer into evidence Plaintiffs' Exhibit 16, the letter dated September 30, 1940, which has been marked and identified as No. 16 by the witness.

Mr. Mitchell: Defendant makes the same objection, and the further objection that the letter is full of self-serving declarations and conclusions of law and factual conclusions which the government does not concede, nor does the government concede that the contention that the money paid was a loan has been steadfastly adhered to by the taxpayer.

So that the issue will be clear, it is the government's contention that the loan theory was an afterthought and it is contrary to the original agreement of the parties, the contract of employment.

The Court: I think that this letter, written in response to the request for information by the agent in charge, is certainly admissible.

(Testimony of J. R. White)

The government cannot insist that only such a statement by the agent as coincides with the government's view, and a contrary assumption in which he acquiesced can't be considered in this particular case. Nor is the government in a position to say that the parties, among themselves, could not modify the contract. The government can't insist that that contract could not be modified by the parties to it. There already is evidence in the record that it was stated that the money would be [108] advanced.

Mr. Mitchell: I don't think the government could modify it.

The Court: The government, in insisting on the paying all the tax on the 7th, the government could not make law by the tax. That was an agreement between them. They could have thrown up the entire contract.

Mr. Mitchell: The government does not contend they could not change the contract.

The Court: By oral agreement.

Mr. Mitchell: Of course, they could.

The Court: All right. Then the government is not in a position to say that they could not change it.

Mr. Mitchell: The government does not so contend, your Honor.

The Court: Whether these have the effect of showing a change, that is a question to be determined later on.

Mr. Mitchell: That is correct. This, though, is a self-serving declaration.

The Court: Nothing is self-serving when a government official asks for information and the taxpayer states his position in the case. The government did not have to

(Testimony of J. R. White)

ask. It is none of his business. He has gotten the tax. Why did he write the letter? [109]

* * * * *

The Clerk: 16 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 16, and was received in evidence.)

[PLAINTIFFS' EXHIBIT 16]

PRICE, WATERHOUSE & CO.

530 West Sixth Street

LOS ANGELES

September 30 1940

Internal Revenue Agent in Charge,
12th Floor U. S. Post Office and
Court House Building,
Los Angeles, California.

Attention: Mrs. Flint

Dear Sir:

FERNAND MERTENS

We have been requested to reply to your letter of September 16 1940 addressed to Loew's Incorporated regarding the 1938 and 1939 Federal income taxes of Fernand Mertens. Your letter requests information regarding any amounts paid to Mr. Mertens in 1939 as reimbursement for 1938 income tax paid to the Collector of Internal Revenue before Mr. Merten's departure from the country in 1938.

Apparently there is some misunderstanding of the facts by your office. When Mr. Mertens applied for his clear-

(Plaintiffs' Exhibit 16)

ance papers in September of 1938 the position was taken that Loew's obligation to pay Mr. Merten's taxes was an obligation only to pay such taxes as might lawfully be assessed against him and that the amount of the obligation could not be determined until the close of the year with respect to which the taxes had accrued. The Collector disagreed with this view and insisted upon the tax being included as additional income in the year of receipt of the earnings and in order to obtain the clearance papers it was necessary for Mr. Mertens to accede to the Collector's view to the extent of paying the tax demanded of him, which amounted to some \$40,000. Accordingly Loew's loaned this amount to Mr. Mertens in 1938 and the amount was paid by Mr. Mertens to the Collector with the understanding between him and Loew's that as soon as the correct amount of tax liability had [131] been lawfully determined the loan would be credited with the amount of the correct liability and the balance of the loan was thereupon to be repaid by Mertens to Loew's.

Internal Revenue Agent

in Charge

-2-

September 30 1940

We are informed by representatives of Loew's Incorporated that:

(1) No reimbursement was made to Mr. Mertens in 1939 since during that year there had not been any determination of liability for that tax,

(Plaintiffs' Exhibit 16)

(2) Mr. Mertens is still indebted to Loew's for the sum of \$40,017.41 advanced to him in 1938 and that no adjusting entries or payments have since been made with respect to this advance, and

(3) During 1939 Loew's paid to the State of California the following sums in respect of 1938 California income tax of Mr. and Mrs. Mertens:

	<u>California income tax of</u>	
	<u>Mr. Mertens</u>	<u>Mrs. Mertens</u>
Instalment paid:		
April 1939	\$ 978.49	\$1,007.85
August 1939	978.49	1,007.85
December 1939	978.49	1,007.85
	<hr/>	<hr/>
	\$2,935.47	\$3,023.55
	<hr/>	<hr/>

which amounts were also charged as advances to Mr. Mertens so that at the present time he is indebted to Loew's for a total of \$45,976.43.

Yours very truly,

Price, Waterhouse & Co.

Copies to—

Loew's Incorporated

Attention of Mr. Melbourne

Messrs. Loeb and Loeb

Attention of Mr. Leon Levi

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Pltf. Exhibit 16. Date 3/31/44. No. 16 Identification. Date 3/31/44. No. 16 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [132]

(Testimony of J. R. White)

Q. By Mr. Zeitzius: Mr. White, do you recall the letter which was a part of Exhibit 11, of October 17, 1940, from the Internal Revenue Agent in Charge?

A. No; I don't remember that.

Q. I hand you the original, which is in evidence as part of Plaintiffs' Exhibit 11, and ask you whether you made a reply to that letter of October 17, 1940?

A. We replied to that on October 22, 1940.

Mr. Zeitzius: I would like to have marked for identification the letter dated October 22, 1940, or, rather, a copy of such a letter, addressed to "Internal Revenue Agent in Charge," signed with the initials "J. R. White."

The Clerk: 17 for identification.

(The document referred to was marked Plaintiffs' Exhibit 17, for identification.)

Q. By Mr. Zeitzius: I hand you what has been marked for identification as Exhibit 17 and ask you if you will state what it purports to be a copy of?

A. This is a copy of our office copy of a letter [113] dated October 22, 1940, the original of which would be on Price-Waterhouse letterhead and signed "Price-Waterhouse & Co" and not with initials.

Q. Did you send the original, or was, according to your records, the original sent to the Internal Revenue Agent in Charge?

A. According to our records the original was sent to the Internal Revenue Agent in Charge.

Mr. Zeitzius: I offer into evidence what has been marked for identification as Plaintiffs' Exhibit 17, and counsel has received a copy of it.

(Testimony of J. R. White)

Mr. Mitchell: The direct foundation is waived and no objection.

The Court: All right. Admitted.

The Clerk: 17 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 17, and was received in evidence.)

[PLAINTIFFS' EXHIBIT 17]

COPY

COPY - LOS ANGELES

October 22 1940

JRW:MEC

Internal Revenue Agent in Charge,
Twelfth Floor, United States Post Office
and Court House Building,
Los Angeles, California.

Attention: Mrs. Flint

Dear Sir:

MR. FERNAND MERTENS
MRS. VICTORINE CATHERINE MERTENS

1938 Federal Income Tax

We acknowledge receipt of your letter of October 17 1940 addressed to the above taxpayers. We understood at the time of our discussion of this matter with Mrs. Flint that her recommendation would be that the claim for refund be disallowed. However, we also understood that an opportunity would be given for the filing of a protest and presumably for an oral hearing with the conference section of your office. We were therefore somewhat sur-

(Plaintiffs' Exhibit 17)

prised to observe that your letter of October 17 1940 did not provide for the filing of a protest.

Yours very truly,

JRW

Copies to—

Messrs. Loeb & Loeb

Loew's Incorporated

Copies to

New York ✓

San Francisco ✓

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Pltfs. Exhibit 17. Date 3/31/44. No. 17 Identification. No. 17 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. L. J. Somers, Deputy Clerk. [133]

Mr. Zeitzius: I now have a few questions of the witness, preparatory to turning him over for cross examination.

Q. On yesterday I believe you testified concerning a conversation that occurred in the Collector's Office on August 30, but I don't think I asked you at that time whether there was included in the conversation any discussion as to who were to put up the amount of tax money which would be computed and paid with respect to the Plaintiffs' incomes then under consideration. [114]

A. You want me to relate the conversation—

Q. Do you recall—

A. —as I recall it on the 30th. or the—

Q. On the 30th.

A. —or any of the conversation before that time about it, or not?

(Testimony of J. R. White)

Q. Well, before and—yes; start before, if you recall any.

A. The question as to who was to pay the taxes and whether or not it was taken into income first arose in discussions between the time that Mrs. Mertens left the country and Mr. Mertens left the country, as to the problem; and there were various discussions at various dates between Mr. Levi, who was attorney for Loew's, and myself, a Mr. Singer, who was a tax man for Mrs. Schulburg, Mr. Mertens' agent, and a Mr. Melbourne, Mr. Henderson—Hendrickson, and Mr. Craig of Loew's. And the problem was being faced as to the legal status of whether or not this money was to be included as income. I was consulted, not as an attorney, because I am not one, but as an accountant familiar with tax procedures, and Mr. Levi, as to the method of how this should be handled. And the—

Mr. Mitchell: May I ask that the time be fixed?

A. I am sorry, I can't state exact dates when these discussions took place, except to say that they were between July 25th and August 30th. [115]

The Court: All right; that is close enough.

* * * * *

Q. By Mr. Zeitzius: What I want, Mr. White, is suppose you confine your answer at the moment to August 30, or within a couple of days of August 30, when the matter was taken up with the revenue officials at that time.

A. The conversation was first with Mr. Ogden of the Revenue Agent's Office on about the 25th or 26th of August. Mr. Levi and I were there and Mr. Levi stated the contention of Loew's that they did not owe this money

(Testimony of J. R. White)

to Gravets and did not have to pay Gravet for—reimburse him for this tax until after the tax had become final. That explanation was given in support of Mr. Levi's argument that the amount should not be included in income.

Mr. Ogden asked who was going to pay the money and how it would be paid; and Mr. Levi replied that, if necessary, [116] he would—if necessary, Loew's would loan the money; that it might be necessary for Gravet to put up a bond, or an attempt would be made to have Gravet pay the money himself.

On the 30th, Mr. Levi told me that—

Mr. Mitchell: Now, just a moment. Was this in the presence of Mr. Ogden or Mr. McDonald?

A. I think what I was about to refer to was in the presence of either Mr. Ogden or Mr. McDonald. [117]

* * * * *

Q. Did you have a conversation with Leon Levi, he acting for Loew's, with respect to whether this money to be advanced for taxes should be by way of a loan to Gravet or otherwise? A. Yes.

* * * * *

Q. By Mr. Zeitzius: Did you thereafter talk to Mr. Mertens concerning that conversation?

A. Yes; I did.

Q. Did you impart to Mr. Mertens—approximately when thereafter did you talk to Mr. Mertens about that? [120]

A. On September 7, 1938, while we were waiting for the cashier's checks to be changed into cash for paying the tax.

(Testimony of J. R. White)

Q. What was your conversation with Mr. Mertens on September 7?

A. I summarized the reasons why the Collector of Internal Revenue had required this inclusion of this \$40,000 in the income and the reasons why I was informed that Loew's would refuse to recognize their liability to pay this tax; and that I had been informed that Loew's would insist on regarding this as a loan until the tax was finally determined; and that it would probably be necessary to file claims for refund at some later date.

Q. What did Gravet say?

A. He told me he understood the matter and that he had been told that this would not result in any financial detriment to him and I pointed out to him then, in any event, he would owe the company at least \$300, being the tax on the French income.

Q. Did he indicate at that time whether or not he understood it was to be treated as a loan?

A. I definitely got the impression that he understood that it was to be treated as a loan. [121]

* * * * *

Q. By Mr. Zeitzius: Did you at that time or promptly thereafter inform Loew's Incorporated what had occurred on September 7th, or the substance of what had occurred?

A. Yes. The incident occurred in the morning, and that afternoon I dictated a letter summarizing the facts to inform Loew's what had been done, and I believe that

(Testimony of J. R. White)

letter was sent out of our office the next day, September 8th.

Mr. Zeitzius: I ask that there be marked for identification as Plaintiffs' Exhibit 18 the photostatic copy of a letter of September 8th, 1938, addressed "to Loew's Incorporated," by Price-Waterhouse & Co., of which I have the original also in my possession.

The Clerk: 18 for identification.

(The document referred to was marked Plaintiffs' Exhibit 18, for identification.)

Q. By Mr. Zeitzius: I hand you what has been marked for identification as Plaintiffs' Exhibit 18 and ask you whether or not that is a true photostatic copy of your reply, I mean the letter to which you referred in answer to the prior question? [122]

A. Yes; this is the copy of the letter.

Mr. Zeitzius: Before offering the photostatic copy in evidence, I would like to have counsel compare the original and the photostat and see if he is satisfied as to the photostat.

Mr. Mitchell: Yes.

Mr. Zeitzius: I offer into evidence what has been marked as Plaintiffs' Exhibit No. 18 for identification.

The Clerk: 18 in evidence.

Mr. Mitchell: The defendant objects on the ground that it is self-serving.

The Court: All right. Let us see what you have.

(Testimony of J. R. White)

Mr. Zeitzius: Does your Honor want to inspect the original?

The Court: All right, it doesn't matter. I don't think cameras lie.

Mr. Zeitzius: No. I meant for convenience on the eyes.

The Court: No. This is good. On these photostats white on black background is good. It is the reverse that is bad, where they have the white background with the black type.

This is a contemporaneous statement by an agent of conversations which had taken place, which sets forth the contentions of the government there made at or about the time the tax was paid, and certainly bears upon what was [123] intended to be done by everybody in the case. It can't be called a self-serving declaration, because from there they could still back out. The tax had only been paid the day before, hadn't it?

Mr. Mitchell: That is right, your Honor. It recites the conversation of the day before.

The Court: That is all right. People do not design alibis for law suits to be filed later, in 1943, on the 15th of September, 1938. To that extent it could not very well be called self-serving.

The Clerk: Admitted? It is admitted, your Honor?

The Court: Admitted, yes. Objection overruled.

(The document referred to was marked Plaintiffs' Exhibit 18, and was received in evidence.)

[PLAINTIFFS' EXHIBIT 18]

PRICE, WATERHOUSE & CO.

530 West Sixth Street

LOS ANGELES

September 8 1938'

[Stamped]: F. L. H. Sep 9 - 1938

Loew's Incorporated,

10202 Washington Boulevard,

Culver City, California.

Attention: Messrs. Floyd Hendrickson

and John Melbourne

Dear Sirs:

MR. AND MRS. FERNAND MERTENS (GRAVET)

On September 7 1938 Mr. Melbourne and our Mr. White assisted Mr. Mertens in obtaining his sailing permit after payment of Federal income taxes for himself and Mrs. Mertens in the amount of \$37,073.27, the computation of which is shown in the statement which accompanied our letter of August 30 1938.

We explained fully to Mr. Mertens the arrangements which had been made with the Collector of Internal Revenue and the Collector's reasons for the requirement that the amount of \$40,017.41 be included in his income as having been "constructively received" from Loew's Incorporated. The company's contention that its liability to pay income taxes of Mr. and Mrs. Mertens could not be determined until the close of 1938 was discussed with Mr. Mertens and he informed us that he understood the problem and was quite agreeable that the amounts advanced by the company for the payment of his and Mrs.

(Plaintiffs' Exhibit 18)

Mertens' taxes should be considered as a loan until the amounts of the taxes are finally determined. We also informed him that it will probably be necessary to file completed 1938 Federal income tax returns in March 1939 and that it may be desirable at that time to file claims for refund.

Mr. Mertens was requested to supply us with statements of the 1938 operations of his farm and stable so that any loss from these ventures can be claimed in the completed returns.

It was explained that it was not necessary to file 1938 California income tax returns until April 15 1939.

Yours very truly,

Price, Waterhouse & Co.

Copy to—

Mr. Leon Levi

Copy to Mr. Melbourne 9-9-38/nt

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Pltf. Exhibit 18. Date 3/31/44. No. 18 Identification Date 3/31/44. No. 18 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. L. J. S., Deputy Clerk. [134]

Mr. Zeitzius: Now, I believe there are just about two more questions. I have doubts as to whether the equivalent of Rule 50 would necessarily cover that which I am going to ask. So, therefore, I will ask the witness:

Q. Who furnished you the information in the refund schedules that we talked about yesterday, consisting of the amounts of income and deductions therein set forth?

(Testimony of J. R. White)

A. The income and deductions, this information was furnished as to salary income by Loew's Incorporated and Warner Brothers, and also by Gravet; as to deductions, by Gravet; and as to the French income and deductions, by Gravet by means of a letter or correspondence after he had [124] gone back to France.

Q. Do those schedules which you examined yesterday correctly show all of that information, that is, the amounts of income and deductions which you set forth in those schedules in the refund claims, as given to you, I mean?

Mr. Mitchell: I think that he has sworn to that and the claim shows on the face of it that he did.

Mr. Zeitzius: All right. If that is your understanding, that that evidence is in the case, I shall not ask for an answer.

Mr. Mitchell: I will stipulate that the witness did not change the figures that were given to him.

Mr. Zeitzius: All right.

The Court: All right.

Q. By Mr. Zeitzius: Did you make a computation on the basis of what would the tax be under the 1934 Revenue Act, using the income and deduction figures used in the tax returns filed on September 7, 1938, for each of the plaintiffs? Did you make such a computation using those figures but without the item of \$40,017.41?

Mr. Mitchell: Just a moment. Does counsel mean the Revenue Act of 1936? He said "1934."

Mr. Zeitzius: No. I think '38 is the Revenue Act. Didn't I state that? [125]

* * * * *

A. I made such computations under the Revenue Act of 1938.

Q. By Mr. Zeitzius: Did you make it on the basis of—

(Testimony of J. R. White)

Mr. Mitchell: Just a moment. I don't quite get that clear. Is this referring to the refund claim of September 7?

The Court: No. He is asked if he made a computation, just like a summary by any accountant, of what the tax would be if you eliminated the \$40,000. Isn't that correct?

Mr. Zeitzius: That is correct. [126]

* * * * *

The Court: In other words, if the government insists upon payment in advance, before filing it, from an alien or anybody who wants to go out of the country, of necessity the government makes a guess and the taxpayer has a right to show then, in the light of subsequent events, what his actual liability was.

Mr. Mitchell: That is correct, your Honor. [127]

* * * * *

The Witness: These computations show that if—

Q. By the Court: This is your working sheet, isn't it? A. Yes, sir.

Q. You haven't got it transcribed, have you?

A. It is not transcribed; no, sir.

The Court: Why don't you have that copied and just let us put it in like a summary of a computation?

Mr. Mitchell: I would like very much to do that, your Honor.

The Court: Why don't we do it, have it written up? Here, take a look at it during the noon hour.

Q. By Mr. Mitchell: This is the computation of the tax?

A. This is (indicating). On this side is a computation of the tax, with the credits for personal exemption and [128] dependents for the period from January 1 to

[PLA

has

FERNARST

VICTORINE CA38,

TA

with

Tax computed without including
any income tax as income

not

Income per returns filed September 7, 1938 and
Deduct—"Income tax" included therein

ach

Revised income

Credits for personal exemption and depend

y—

Surtax net income

Earned income credit

ary

Normal tax net income

on

Normal tax

Surtax

you

Total tax

low

Tax computed by including
above income tax as income

use,

Surtax net income as shown above

uch

Add—Total tax item shown above

idi-

Adjusted surtax net income

l.

Earned income credit

am

Normal tax

Surtax

ted

ice.

Total tax

to

[Endorsed]: Case No. 3002. Mertens
 No. 19 in Evidence. Clerk, U. S. District

Mr.

om-

ber

(Testimony of J. R. White)

Mr. Mitchell: Just a moment. I don't quite get that clear. Is this referring to the refund chain of September 7?

The Court: No. He is asked if he made a computation, just like a summary by any accountant, of what the tax would be if you eliminated the \$40,000. Isn't that correct?

Mr. Zeitzius: That is correct. [126]

* * * * *

The Court: In other words, if the government insists upon payment in advance, before filing it, from an alien or anybody who wants to go out of the country, of necessity the government makes a guess and the taxpayer has a right to show then, in the light of subsequent events, what his actual liability was.

Mr. Mitchell: That is correct, your Honor. [127]

* * * * *

The Witness: These computations show that if—

Q. By the Court: This is your working sheet, isn't it? A. Yes, sir.

Q. You haven't got it transcribed, have you?

A. It is not transcribed; no, sir.

The Court: Why don't you have that copied and just let us put it in like a summary of a computation?

Mr. Mitchell: I would like very much to do that, your Honor.

The Court: Why don't we do it, have it written up? Here, take a look at it during the noon hour.

Q. By Mr. Mitchell: This is the computation of the tax?

A. This is (indicating). On this side is a computation of the tax, with the credits for personal exemption and [128] dependents for the period from January 1 to

(Testimony of J. R. White)

September 1, 1938. This first computation is the amount of tax, without including any tax as income. The second computation, below here, up above that here, is the tax if you include only the first tax as income. In these—

Q. The general tax, you mean?

Mr. Zeitzius: No. He means—

A. No; the first tax.

Mr. Mitchell: The first tax on \$120,000?

A. The first tax on \$120,000. This column over here, which I have not put all the captions in, makes the same two computations but uses a full year's personal exemption and credit.

The Court: Supposing you have it transcribed and supply the captions and bring it back this afternoon. It is all in condition where anyone who is used to copying documents like this in an accounting office can get it out quickly.

The Witness: All right.

The Court: And then it may be marked. It will be given as a summary. You know the usual way we do with a copy of a summary.

Mr. Mitchell: We will have no objection at all. It will be very helpful, I think.

The Court: Yes.

Mr. Mitchell: In addition to that—

The Court: We will identify it now so we will know [129] what we are speaking of. What is the number?

The Clerk: 19.

The Court: 19. It will be exhibit 19 for identification.

(The document referred to was marked Plaintiffs' Exhibit 19, for identification.)

[PLAINTIFFS' EXHIBIT 19]

FERNAND GRAVET MERTENS
VICTORINE CATHERINE RENOUD MERTENS
TAX CALCULATIONS

Using credits for personal exemption and dependents for

Tax computed without including any income tax as income	<u>Eight months</u>		<u>Full year</u>	
	<u>Each spouse</u>	<u>Total</u>	<u>Each spouse</u>	<u>Total</u>
Income per returns filed September 7, 1938	\$77,425.11	\$154,850.21		
<u>Deduct</u> —"Income tax" included therein	20,008.71	40,017.41		
Revised income	\$57,416.40	\$114,832.80	\$57,416.40	\$114,832.80
Credits for personal exemption and dependents	1,100.00	2,200.00	1,650.00	3,300.00
Surtax net income	\$56,316.40	\$112,632.80	\$55,766.40	\$111,532.80
Earned income credit	1,400.00	2,800.00	1,400.00	2,800.00
Normal tax net income	\$54,916.40	\$109,832.80	\$54,366.40	\$108,732.80
Normal tax	\$ 2,196.66		\$ 2,174.44	
Surtax	9,670.74		9,487.78	
Total tax	\$11,867.40	\$ 23,734.80	\$11,662.22	\$ 23,324.44
Tax computed by including above income tax as income				
Surtax net income as shown above	\$56,316.40	\$112,632.80	\$55,766.40	\$111,532.80
<u>Add</u> —Total tax item shown above	11,867.40	23,734.80	11,662.22	23,324.44
Adjusted surtax net income	\$68,183.80	\$136,367.60	\$67,428.62	\$134,857.24
Earned income credit	1,400.00	2,800.00	1,400.00	2,800.00
	\$66,783.80	\$133,567.60	\$66,028.62	\$132,057.24
Normal tax				
Surtax	\$ 2,671.35		\$ 2,641.14	
	14,079.03		13,777.16	
Total tax	\$16,750.38	\$ 33,500.76	\$16,418.30	\$ 32,836.60

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Pltf. Exhibit 19. No. 19 Identification. Date 3/31/44
No. 19 in Evidence Clerk, U. S. District Court, Sou. Dist. of Calif. L. J. Somers, Deputy Clerk.

[135]

(Testimony of J. R. White)

Mr. Mitchell: Do I understand that the witness has three separate computations? Does this include the first one that was originally submitted on August 25, 1938, to the Collector's Office?

The Witness: No.

Mr. Mitchell: I would ask that that be added to it.

Mr. Zeitzius: That I tried to get in yesterday with my letter of August 30, which I think was ruled out.

The Court: He objected to the letter. He did not object to the computation, and you can tear that off and put it in as a summary, if you want to, or have him attach it to this, say.

Mr. Zeitzius: Yes. I think the witness would say—

Q. Is this correct, Mr. White: That the summary that is attached to the return of one of the Mertens on September 7, 1938, is the same as the summary that you submitted here earlier to the Revenue Office?

A. Yes. In my opinion, it is not necessary to show the computation to arrive at this \$40,000 figure, because, once having arrived at it, it is self-proving and is much more clearly shown by just using the \$40,000 figure indicated, [130] because the answer proves at the bottom.

Mr. Mitchell: No; I am not referring to that. I am referring to the original computation that was submitted August 25 and was rejected by the Collector's Office. That was the original computation.

Mr. Zeitzius: Oh, I see. Yes; I am agreeable to producing that.

The Court: All right; you may supply that, Mr. White. You probably have it somewhere.

The Witness: Yes; it is right here.

Q. By Mr. Zeitzius: Then, did you also make a computation showing what would be the tax on the September

(Testimony of J. R. White)

7th return basis, with the inclusion only of the income and deductions shown therein and the addition, in lieu of the \$40,017.41, the addition of the tax on that income without \$40,000?

A. Yes. That is the second series of computations on the sheet.

Mr. Zeitzius: In other words, I wanted to be sure. From what was said to date it did not strike me that the witness had said anything about making such a computation.

The Court: All right.

Mr. Zeitzius: That is, the tax upon the inclusion of only one tax. If that be understood, then I have nothing further to ask the witness on that. [131]

* * * * *

LEON LEVI,

called as a witness by and on behalf of the Plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name?

A. Leon Levi.

Direct Examination

By Mr. Zeitzius:

Q. Your name is Leon Levi, L-e-v-i?

A. That is correct.

Q. Where do you reside?

A. In Los Angeles. [132]

Q. What is your occupation, Mr. Levi?

A. Well, at the present time I am a business man. I was an attorney at law up until the end of last year. I

(Testimony of Leon Levi)

am still a qualified attorney, although not actively practicing.

Q. You were a member of the firm of Loeb & Loeb, as I believe the parties have stipulated. You are the party referred to as Leon Levi in paragraph 17 of the stipulation, the last paragraph?

A. I was a member of the firm from the beginning of 1941 until the end of 1943. That is a period of three years.

Q. Yes.

A. Prior to that time, ever since 1931, I was employed by the firm.

Q. During 1938 you were employed as a lawyer by the firm of Loeb & Loeb?

A. That is correct.

Q. Did you know the plaintiff, Fernand Mertens, otherwise known as Gravet? A. I met him.

Q. Will you state whether you met him at any time in the month of August, 1938?

A. I can't tell you definitely as to whether I met him during the month of August or not. I know that I met him and met with him prior to September 7 of 1938.

Q. And where was that?

A. That was at the studio, in his dressing room. [133]

Q. And who all were present?

A. At the conference I have in mind there was present myself and Mr. Jack Melbourne, who was then employed by Loew's Incorporated, and Mr. Gravet, and I believe Mr. White, although I am not positive as to whether Mr. White was present at this particular one or not.

(Testimony of Leon Levi)

Q. At that conference was there any discussion—oh, first of all, you are familiar with the tax controversy in this case?

A. I am very familiar with it.

Q. With respect to the time you mentioned in September, in what capacity were you acting at this conference? Who were you representing then?

A. I was representing Loew's Incorporated.

Q. What was the occasion of that conference with Gravet and the gentlemen you named?

A. We had been called on—when I say “we” there, I mean Mr. White and myself had been called upon—to expedite the obtaining of a sailing permit so that Mr. Gravet could leave the country.

Pardon me, may I ask that the question be repeated, please?

(Question read.)

A. Mr. White and I had had—

Mr. Mitchell: Excuse me. So that I will understand you, you are referring to the studio conference? [134]

Mr. Zeitzius: That is right; prior to September 7th.

A. Mr. White and I had had a series of conferences at the Collector's Office with a view to determining what would be necessary in order to obtain this sailing permit. And following those conferences and prior to the day that Mr. Gravet was to go down to obtain his compliance certificate, I went out to the studio for the purpose of meeting with him and explaining the whole thing to him, so that he would know what he was doing when he went down to the Collector's Office.

(Testimony of Leon Levi)

Q. What did you explain? You say you explained the whole thing to him. Just what did you tell him?

A. I told Mr. Gravet at that time that there was a very serious controversy with the government as to the amount of taxes that would have to be paid in order to obtain his compliance certificate. I pointed out to him that under the terms of his contract with Loew's Incorporated—

Mr. Mitchell: Just a moment.

The Witness: I will change that. I am sorry.

Mr. Mitchell: Just a moment. I make the same objection to the recital of this conference, on the ground that it is self-serving; that the plaintiff should be here to testify himself; that it is an indirect method of avoiding the customary burden.

The Court: I don't see it. Loew's is an adversary to Gravet in this controversy. Loew's is the employer to the [135] contrary of this gentlemen as representing Gravet. Loew's may testify to conferences he had with Gravet as to the meaning, and if indirectly it strengthens the position which Gravet takes in this case, it merely happens that both of them make the same contention.

Mr. Mitchell: I also object to the particular portion of his testimony as to the contents of a written instrument as not the best evidence and as a conclusion of the witness.

The Court: I have not heard him testify. He started to say something. He pointed out something. I don't know.

Mr. Zeitzius: That is right. He was pointing out the conversation with Gravet, were you not, Mr. Levi?

The Court: Overruled. Go ahead.

A. I pointed out to Mr. Gravet in that conversation, I pointed to the provisions of the contract which state that

(Testimony of Leon Levi)

Loew's will pay taxes lawfully assessed against him in the United States. I explained to him that it was the position of Loew's Incorporated that there was no liability on their part to make any payment to Mr. Gravet until such a time as taxes had actually been lawfully assessed against him; and that Loew's would not pay the taxes that the Collector of Internal Revenue was demanding as a condition to the issuance of this compliance certificate. I told him that I had been authorized by Loew's Incorporated to offer to lend him, lend Mr. Gravet sufficient money so that he could pay the tax as demanded by the Collector and secure his sailing [136] certificate, and that then we would have to let the question of the ultimate repayment of that loan hinge upon a final determination as to what his actual lawful tax liability was, once it was determined what taxes could or should have been lawfully assessed against him.

We had quite a lengthy conversation about that and Mr. Gravet understood it thoroughly and expressed himself to me as being in complete accord with that procedure.

We then arranged—at that time, at the date of that conference, the time and place of the final meeting with the Collector had already been determined upon. We were to go down, or he was to go down, rather, to the Collector's Office on September 7th at some specific hour, I think it was in the morning, and I called that all to his attention and made the arrangements for Mr. Melbourne to meet with him that morning and to see to it that he was escorted down to the Collector's Office.

Q. By Mr. Zeitzius: You referred to prior—

Mr. Mitchell: Excuse me. I don't know just who Mr. Melbourne is.

(Testimony of Leon Levi)

Mr. Zeitzius: Melbourne, Loew's employee.

A. Mr. Melbourne at that time was employed in the accounting department of Loew's Incorporated, and he was the man at the studio who handled the routine from an accounting end of tax matters.

Mr. Mitchell: I see. [137]

A. I was in charge of all of their tax matters, the legal end of all of their tax matters, and in effect supervised Mr. Melbourne in that phase of his work.

Q. By Mr. Zeitzius: Did you say you had—you did say that you had previously been at the Collector's Office; in fact, you had a series of conferences. Did you have occasion to come here on or about August 30, 1938, with Mr. White?

A. On August 30, 1938, Mr. White and I went together to the Collector's Office to receive the final word from the Collector as to what position he was going to take in the matter in view of the facts and information and arguments that had been submitted to him in our previous meetings.

Q. On the occasion that you went to the Collector did the question as to the source of the money that would have to be paid as taxes come up?

A. It very definitely came up when Mr. Ogden told me that the government, the Collector, was taking the position that the tax on the tax on the tax would have to be included in order to get the sailing certificate. I told Mr. Ogden—I knew him fairly well prior to that time, having been in school with him—and I told him in no uncertain terms that Loew's Incorporated was not going to pay that tax; that we would do one of two things: We would either arrange for Mr. Gravet to post a bond,

(Testimony of Leon Levi)

which he had the right under the law to do—post a bond pending the final determination of [138] the tax, and obtain his sailing permit that way, or more probably, that Loew's Incorporated would lend Mr. Mertens sufficient cash so that he himself could make the payment, but that in that case it was going to be regarded as a loan by Loew's Incorporated until such time as the lawful tax liability had been properly determined.

Q. Did he make any reply, Mr. Ogden, when you told him it would be a loan or regarded as a loan?

A. His only reply was that the Collector's Office felt that it was their obligation in issuing a sailing certificate, a compliance certificate, they felt it was their obligation to impose the tax on the highest possible basis that they could make seem reasonable under the circumstances, and that they could not issue the sailing certificate on any other basis.

Q. Was anything said as to the propriety of including more than one tax?

A. Well, there was a great deal said there. There had been a great deal said about that same thing in the meetings that we had had down there during the two or three days preceding August 30th, because that was our whole issue and our whole argument. That was the reason why Mr. White and I decided to go down to the Collector's Office almost two weeks in advance of the sailing date, because we wanted to point out to the Collector, and we did point out to the Collector, that this issue existed and that it was [139] a complicated one and that it should be settled before the day on which Gravet came down there.

(Testimony of Leon Levi)

We took the position throughout the entire discussion that certainly there should not be any tax on the tax in any event, and according to my interpretation of the language "Lawfully assessed" that the government had no right to include that tax at all, even one tax, let alone the tax on the tax.

Q. And what reply to that, if any, did Mr. Ogden make?

A. Well, I have already stated that.

Q. Oh, I see.

A. That they had to collect on the maximum theory.

Q. On the maximum theory?

A. That they, in issuing a sailing certificate—it behooved the Collector to impose taxes on the maximum basis, giving the government the benefit of doubt on every issue involved. [140]

* * * * *

A. During our first conference at the Collector's Office Mr. White and I went, first, to Mr. McDonald's desk and talked to him. We showed the two agreements that constitute, one, the employment contract, and the other, the supplemental agreement that contains the clause that has reference to the payment of taxes.

The Court: Those are exhibits 1 and 2 in this litigation. You were here yesterday?

The Witness: I don't recall the numbers. I know they are in evidence.

The Court: 1 and 2.

Mr. Zeitzius: Let the witness look at Exhibits 1 and 2 and state whether or not those are the ones he is referring to now.

(Testimony of Leon Levi)

A. These are the ones. I called Mr. McDonald's attention particularly to the provisions of paragraph 1 of Exhibit 2. That is the paragraph wherein Loew's Incorporated agrees to pay the taxes, such taxes as may lawfully be [141] assessed against Mr. Gravet. And I called Mr. McDonald's attention, further, to the question that there would be, or, further, to the effect that there would be a question on the part of the Collector undoubtedly as to whether that tax should be incorporated into the return issued prior to obtaining the compliance certificate.

Mr. McDonald stated that the question was a novel question to him; that he did not feel disposed to answer it, but that he felt it should be answered by someone in the legal department of the Collector's Office. Mr. McDonald then took us to Mr. Ogden's office which was, if I remember correctly, on the same floor of the same building, way around the corner and at the end of a large room. We started all over again with Mr. Ogden, showing him these contracts and calling his attention particularly to that provision. Mr. Ogden in turn stated that, so far as he knew, it was a novel question at this Collector's Office and that he did not want to answer that question without consulting his superiors. He suggested that we leave the matter with him and come back at some later date for a reply.

And those were the events, then, that led up to the conference of August 30th, at which time Mr. White and I again went back and at which time we were advised of the decision which had been reached at the Collector's Office.

(Testimony of Leon Levi)

Q. Was there any discussion with respect to whether [142] the income of Mr. Mertens was community property or not?

A. There was discussion of that, but only comparatively minor discussion because it was agreed by everyone that it was.

Mr. Mitchell: I move that that part of that answer be stricken, that it was agreed.

The Court: "That it was agreed" is a conclusion. It may be stricken out.

Q. By Mr. Zeitzius: What was the conversation in respect to this discussion concerning community property?

A. We, Mr. White and I, told the gentlemen from the Collector's Office that it was our opinion that Mr. Gravet was entitled to claim community property under the laws of the State of California, being a resident alien and having resided and earned money here in California; but that we did not think that that question was particularly material, in any event, because the parties, Mr. and Mrs. Gravet, had informed us that they were married in France and that therefore the property would be community property under the laws of France, in any event. And I don't believe that there was ever—as far as I recall of, there was never any final decision reached by any of us as to which of those two grounds justified the use of the community property, but the community property distribution was consented to by Mr. McDonald and Mr. Ogden.

Mr. Mitchell: I move that that be stricken. [143]

The Court: That may be stricken out. The record does show. You are familiar with the tax returns that were prepared and finally signed by Mr. Gravet?

(Testimony of Leon Levi)

A. Yes; I am.

Q. And notarized by Mr. Ogden as a deputy collector?
A. I am.

Q. They are based upon splitting the income in two and then computing it on that basis. In other words, whatever your agreement, actually you split the maximum income in two and it was paid in that manner.

A. That is correct.

The Court: All right.

Mr. Zeitzius: I think of no further questions. You may cross examine.

Cross-Examination

By Mr. Mitchell:

Q. Mr. Levi, did you hear Mr. White testify yesterday that back there in early June, 1938, that you called him up and asked him to assist Mr. and Mrs. Mertens in procuring a sailing permit for Mrs. Mertens in June, 1938?

Mr. Zeitzius: May I ask if he is just asked whether he remembers? That is the question?

Mr. Mitchell: Yes. Answer yes or no.

The Court: Yes.

Q. By Mr. Mitchell: Did you hear Mr. White so testify?

A. If he so testified, I heard him because I was here [144] in the courtroom yesterday. That is a fact, however.

Q. You did? A. I did.

Q. How did you happen to do that?

Mr. Zeitzius: At this time—

Mr. Mitchell: This is not proper cross examination.

(Testimony of Leon Levi)

Mr. Zeitzius: That is right. That is my point.

Mr. Mitchell: But if counsel wants to let this witness go—

Mr. Zeitzius: I see. Go ahead.

The Court: Gentlemen, in a case of this character, a trial without a jury, the order in which evidence comes in does not matter so much. I have known Mr. Levi very long. I do not think he appeared before me. He did not do much court work. But I know his reputation and I know he is going to tell the truth, whether he is called as a government witness or called as a witness by the plaintiffs.

Mr. Zeitzius: I withdraw the objection I was about to make.

The Court: I have no desire to be technical and will allow him to bring in the facts at this time, because Mr. Levi is busy and he should be released as quickly as possible.

Mr. Zeitzius: I will withdraw all objection.

The Court: All right; go ahead.

Q. By Mr. Mitchell: How did you happen to make that arrangement, Mr. Levi? [145]

A. Well, either in May or June of 1938 it became obvious that we were going to have some questions involved, some complicated tax problems involved.

Q. When you say "we" whom do you mean?

A. Well, I mean, the way I used it there, I meant Loew's Incorporated and Gravet, both, because we regarded it all as one entity in our endeavor to secure the sailing permit. It was just as important for Loew's

(Testimony of Leon Levi)

Incorporated, I suppose, to see that he got what he wanted as it was for him to get it.

Q. This was before the contracts, Exhibits 1 and 2 were executed, was it not?

A. That is correct. At that time it was known that Mrs. Gravet was going then to leave the country, and we knew that sooner or later Mr. Gravet would want to go back to France.

Q. How did you obtain that information?

A. Well, I assume—I don't recall. I must have been called in by one of the studio executives who told me that Mrs. Gravet was getting ready to leave the country.

Q. I see.

A. When I started then examining the situation I realized that we had an immediate problem for Mrs. Gravet just on the community property issue alone, and then there was also the same question involved at that time as to whether Loew's Incorporated had any liability immediately [146] at that time for the payment of her tax; in other words, whether it could be regarded as an immediate lawful assessment.

And I advised the executives at Loew's Incorporated that I felt that Price-Waterhouse, Mr. White particularly, should be called in upon this job because I had just a few months before completed a rather similar situation out at Universal and Mr. White had handled the Schulburg end of that deal. I knew he was familiar with the problems and I felt that he should be called in to handle this one.

Q. For whom were you acting when you employed Mr. White?

A. Well, I was acting for Loew's Incorporated and—

(Testimony of Leon Levi)

Q. Who paid Mr. White's compensation for that June service?

Mr. Zeitzius: I object on the ground it is immaterial who paid Mr. White for his services, where it appears that— [147]

* * * * *

A. Well, I am quite certain that Loew's Incorporated, Metro, did. I think you have two better witnesses to that fact here.

Mr. Mitchell: Very well.

A. But I am quite sure they did.

Mr. Zeitzius: May it be understood, of course, that the testimony goes in under this objection, so we are not in a position of waiving it, and that there is no attack in the pleadings on the part of the government. The answer sets up no defense of which I am aware for a contention that may be in Mr. Mitchell's mind in asking that question. I do not [148] know just exactly why he is asking it, but that will develop. [149]

* * * * *

The Court: All right; it will remain.

Mr. Mitchell: And I do not know what the answers will be.

The Court: His answer is that he thought they had paid it, but that we have two persons in the courtroom who can probably give you a more definite answer than he can, [150] although his own impression is that Loew's paid it.

Q. By Mr. Mitchell: Mr. Levi, did I understand you correctly to state that at this studio conference just prior to September 7, 1938, you were then representing Loew's Incorporated? A. That is correct.

(Testimony of Leon Levi)

Q. At that conference? A. Yes; that is correct.

Q. Mr. Levi, you referred to the conversations relating to the proposition that Loew's would do one of two things: Either arrange a bond or security in order to procure the travel permit under the section 146 of the Statute, or would loan the money to Mr. Gravet.

A. Well, I—

Q. I have not asked my question yet. You told that to Mr. Gravet on that occasion, as I understand it. Do I understand you correctly? Is that correct?

A. Well, I don't think I said quite as specifically as you did that Loew's would arrange the bond.

Q. Or that a bond would be arranged?

A. That a bond would be arranged.

Q. Either one or the other?

A. Because I didn't know at that time—in fact, never did find out what would be needed to get that bond. It is perfectly possible that Gravet might have raised it himself without any assistance from Loew's, and it is [151] equally possible that Loew's might have had to assist him in some way in raising it. I didn't know.

Q. At this conversation with Mr. Gravet or Mr. Mertens on this subject he said, did he not, that any arrangement Loew's might make regarding procurement of the sailing permit would be all right with him so long as it didn't cost him anything financially, or something to that effect?

The Witness: May I hear the beginning of that question? I want to know what conversation you are talking about.

(Question read.)

(Testimony of Leon Levi)

A. Well, it was not as simple as that. There was quite a bit of discussion and conversation, and even argument, about this loan proposition. He did, however, finally agree that he—

* * * * *

A. Well, he did finally say, after considerable discussion he finally said that it was satisfactory to him that the money that Loew's was to advance should be regarded as a loan and that the ultimate liability would await determination of the final assessment.

Q. All right. That was at the studio conference just prior to September 7? [152]

A. Yes.

Q. And Mr. White was present, or was he?

A. Well, I am not positive on that. My recollection is that he was. I have no idea what his recollection is on that.

Q. And that—we will call it an understanding regarding the loan that you then had with Mr. Gravet—was later reduced to writing?

A. Not so far as I recall, other than the writing that took place in entries on the company's records and so on. There was never any note given for the loan or anything like that, if that is what you mean.

Q. Wasn't there a letter written and delivered to Mr. Gravet on September 8th setting forth the loan arrangement?

A. Yes; but I don't believe that that was a document that was executed by Mr. Gravet. I misunderstood your question, then. There was later a letter explaining how the whole transaction had been handled. But I misunderstood what you meant when you asked me if the loan ar-

(Testimony of Leon Levi)

rangement was reduced to writing. I thought you meant in a bilateral agreement.

Q. I hand you a photostat which was furnished the revenue agent last August, purporting to be a copy of a letter on the stationary of Metro-Goldwyn-Mayer Pictures, dated September 8, 1938, addressed to "Mr. Fernand Gravet" and signed "Loew's Incorporated by E. J. Mannix," and ask [153] you whether you are familiar with this letter, the original of this letter or the office copy?

A. Yes; I am.

Q. Did you assist in wording or drafting that letter?

A. I think I probably drafted it, as a matter of fact. I notice it bears initials down in the corner here that could very well be mine and the language sounds a little bit as though it were mine.

Q. Was that delivered to Mr. Gravet?

A. That was delivered to Mr. Gravet.

Q. To your knowledge?

A. Yes.

Q. By whom?

A. I am almost positive that I delivered it to him myself.

Q. The date it bears or the following day or when?

A. No. No; I think it probably was a few days later.

Mr. Mitchell: We ask that this copy—by the way, who is Mr. Mannix whose name appears there?

A. He is one of the chief executive officers out at the studio.

Mr. Mitchell: We ask that this be marked for identification.

The Court: Very well.

(Testimony of Leon Levi)

The Clerk: A for identification.

(The document referred to was marked Defendant's Exhibit A, for identification.) [154]

The Court: Don't you want it in evidence now? There is no objection.

Mr. Zeitzius: None whatsoever if counsel wants it. I have no objection.

Mr. Mitchell: Has counsel another copy of it? That is the only copy I have.

Mr. Zeitzius: Yes; I have a copy. [155]

* * * * *

The Court: All right; Exhibit A.

(The document referred to was marked Defendant's Exhibit A, and was received in evidence.)

[DEFENDANT'S EXHIBIT A]

COPY

METRO-GOLDWYN-MAYER PICTURES

Culver City

California .

September 8, 1938.

Mr. Fernand Gravet

Westwood Ambassador Apartments

Wilshire Boulevard

West Los Angeles, California

Dear Sir:

We are writing this letter to confirm certain arrangements which now exist between us so that there will be no chance of any misunderstanding.

(Defendant's Exhibit A)

On September 7, 1938, we advanced to you the sum of \$37,073.27 for your use in payment of Federal income taxes. Heretofore, on June 21, 1938, we advanced you the sum of \$3,245.92 for your use in payment of Federal income taxes which were then to be paid by your wife. In each instance these sums so paid by us to you were treated by us as loans for your account.

We realize, of course, that ultimately we will be required as a part of our contractual liability to you to pay certain of your taxes as set forth in our agreements with you. Nevertheless, our exact liability cannot be determined at the present time, and in all probability will not be determinable at least until after the end of this calendar year.

As stated above, our records now disclose that you are indebted to us in the sum of \$40,319.19, being the total of the two payments above referred to. As soon as the exact amount of our liability to you under our agreements can be determined we will credit your indebtedness with the amount of such liability, and if there is any excess then owing from you to us we will, of course, expect you to refund the same to us. We agree, however, that we will not make any demand upon you for payment of any portion of this in- [186] debtedness until after such time as the proper amount of our liability for your taxes has been determined.

Very truly yours,

LOEW'S INCORPORATED

By E. J. MANNIX

LL:nt

(Defendant's Exhibit A)

I hereby certify that the foregoing instrument is a correct copy of the original.

Dated: August 4, 1943.

[Seal]

Ellowene Evans

Notary Public in and for the County of Los Angeles
State of California

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Deft. Exhibit A. Date 3/31/44. No. A Identification. Date 3/31/44. No. A in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [187]

Q. By Mr. Mitchell: At whose suggestion, if any, was this Government's Exhibit A drafted by you, Mr. Levi?

A. I think probably at my own suggestion. I wanted to have a written record that would confirm what had happened.

Q. I see. Did you deliver this or mail it to Mr. Gravet?

A. Well, I have already stated I think I delivered it. I think I personally handed it to him, but I am not certain of that.

Q. You were examined on direct examination concerning exhibits 1 and 2 which purport to be portions of the contract of July 29, 1938. Did you prepare those two letters, Plaintiffs' Exhibit 1 and 2?

A. No. I would not have prepared them. I personally might have been responsible for some of the language that appears in the tax clause.

(Testimony of Leon Levi)

Q. In the tax clause, Exhibit 2?

A. Yes; paragraph 1 of Exhibit 2, I think it is, or [157] maybe even the whole agreement. I undoubtedly was called on to approve it before it was sent out, because it was routine in our office that any clause like that pertaining to taxes had to be approved by me before it was sent out.

Q. That is, in Loeb & Loeb's office? A. Yes.

Q. Do you know who prepared these two, who had active charge of drafting them on behalf of Loeb & Loeb?

A. If I can see that, maybe I can tell.

Mr. Zeitzius: Suppose I hand you the originals. The photostats, I believe, are in evidence.

Mr. Mitchell: Very well.

The Court: All right.

Q. By Mr. Mitchell: Do the originals bear any initials, Mr. Levi?

A. Why, up at the very top of the page there is a date.

Q. On Exhibit 1 or 2? A. On both.

Q. Oh.

A. There is a date on Exhibit 1. It says "7-27-38 C. W." which I believe would mean that Mr. George Cohn of Loeb & Loeb did the dictating and his secretary, Miss Whittington, transcribed it; and the same, but with the exception of the date "7-29-38" appears on Exhibit 2.

Q. Do you know who passed on these two documents, [158] Exhibits 1 and 2, if anyone, for Mr. Gravet? Was it Mrs. Schulburg or her attorney?

A. Mrs. Schulburg was his agent and she—

(Testimony of Leon Levi)

Q. His business agent?

A. Yes. She undoubtedly passes on them, and whether she consulted anyone else or not I couldn't tell you. The original contract that he had, I understand, she wrote herself, so she may have answered—

Q. What original contract do you refer to?

A. Well, I think I was thinking of the Dario case, the other case I referred to. She was the agent in that, too, but she sometimes tried her hand at writing these things herself. So I couldn't tell you whether she had anyone else pass of it or not.

Q. She was the business agent but she was an attorney?

A. Not that I know of.

Mr. Mitchell: Exhibit 1, paragraphs 3 and 4, refer to an Exhibit A attached to Exhibit 1. I will ask counsel now to produce the Exhibit A that was attached to Exhibit 1.

Mr. Zeitzius: This is our only copy.

Mr. Mitchell: I do not want to encumber the record, your Honor. This is a document I have never seen, and if I may be permitted to examine it over the noon hour?

Mr. Zeitzius: Very well.

Mr. Mitchell: To determine whether I think it material at all, I might save encumbering the record. [159]

The Court: Is this Exhibit A of the statement of facts?

Mr. Mitchell: No, your Honor; Exhibit A attached to Plaintiffs' Exhibit 1, referred to in Exhibit 1, paragraph 4.

Mr. Zeitzius: May I make a statement that may aid?

The Court: Yes.

(Testimony of Leon Levi)

Mr. Zeitzius: That was an offer to enter into another contract with Gravet to commence in the future, giving him a time limit, I think, to October 15 in which to accept it, and therefore it was merely attached to this contract as an offer. It was not a part of the contract or the purpose of this suit.

The Court: It might be.

Mr. Mitchell: It is part of the *res gestae* and it may be very material.

The Court: Yes. It might bear upon future intentions. It might work both ways.

Mr. Zeitzius: With that view—

The Court: It might lend itself to an argument that strengthens the position that he intended to come back because he had an option to renew the contract.

Mr. Zeitzius: Yes. Well, I will see to it.

The Court: It might lend itself to the other one, that he threw it away and tried to dig it up. So therefore, in other words, it has a bearing upon the issue. I have not seen it because it is not attached. If you are not offering it now, it is all right. [160]

Mr. Mitchell: No, your Honor. I would like to look it over during the noon hour.

The Court: All right. So long as you get through with this witness, you may take your time to look it over.

Mr. Mitchell: All right.

Q. Do you recall, Mr. Levi, having seen the so-called Mervyn LeRoy contract referred to in paragraph 1 of Plaintiffs' Exhibit 1 in this case, a contract described as being dated May 6, 1936, between LeRoy and Mr. Gravet?

A. Yes; I undoubtedly saw that.

(Testimony of Leon Levi)

Mr. Mitchell: We also demand production of that, because Exhibit 1 is a supplement or an amendment of the LeRoy contract.

The Court: All right.

Mr. Mitchell: And we will ask that we be permitted to look over it during the recess.

The Court: All right.

Mr. Zeitzius: This is the only copy. It is an unsigned copy, except that in pencil someone has written the names Gravet, I believe, but it is not in Gravet's handwriting.

Mr. Mitchell: Very well.

Q. Oh, Mr. Levi, do you know whether or not Mr. Gravet exercised the option referred to in paragraph 4 of Exhibit 1?

A. That is the option to take up that other employment contract? [161]

Q. That is right.

A. So far as I know, he did not. I would not be the person who would have the best knowledge of it.

Q. I believe we stipulate that Mr. Gravet never returned to the United States after September 7, in the stipulation of facts.

A. Yes. That I know for a fact, but whether he had exercised or not exercised his option I am not certain.

Q. You don't know?

A. I don't think he did.

Q. Do you know whether or not "The Great Waltz" was dubbed into French?

A. No; I couldn't answer that.

Q. As referred to in paragraph 3 of Plaintiffs' Exhibit 1, for French distribution. "Dubbing shall be per-

(Testimony of Leon Levi)

formed between October 15, 1938, and December 15, 1938”?

A. I could not answer that. That work would have been over in France, so it would not necessarily involve his coming back here. But I don't know whether they did it or not.

The Court: Sometimes they dub it in by just having the French voices do the talking in the same country to which the language relates?

A. This agreement, I think, your Honor, provided that he should do it, and if he was in France at the time the work was to be done, in France. [162]

The Court: All right.

Q. By Mr. Mitchell: Mr. Levi, you also attended conferences before the conference bureau of Internal Revenue, or before the conferee, according to the evidence that is here, you and Mr. Keesling, and also appeared at an informal conference before the technical staff subsequently, pursuant to request that the taxpayers be given a hearing before the technical staff?

A. Mr. Mitchell, to the best of my recollection I was not present at either of those conferences.

* * * * *

The Witness: I am named in the power of attorney.

Q. What is that?

A. I say, I think my name appears on the power of attorney, but I do not believe I attended the conferences. I think Mr. Keesling handled those by himself. I have no recollection of having been at those conferences.

* * * * *

(Testimony of Leon Levi)

Q. Then, you did not appear at either conference?

A. I don't think I did. [163]

* * * * *

Q. By Mr. Mitchell: Conferences before the Revenue Agent and before the technical staff subsequent to the refund claim.

A. I was not at those conferences.

Q. You were not there. Didn't you refer to a power of attorney?

A. I said I may be named in the power of attorney. I am quite sure Frank Keesling attended those conferences, and it was our general practice that anytime Frank Keesling was named in a power of attorney—he worked in my department; I was the head of the tax department and he worked in the tax department—and it was our custom to always have my name appear on the power of attorney so that if your files disclose that it was a power of attorney in favor of Frank Keesling, you will probably find my name is also on it. And I don't think I attended the conferences. I have no recollection attending them. I do not even know the dates on which they were held. [164]

Q. I hand you, Mr. Levi, two certified copies of two what purport to be substitutions of Mr. Keesling and Mr. Levi as attorneys in fact for Fernand and for Victorine Mertens, signed by J. R. White, a substitution of attorney in fact, and ask you whether those refresh your recollection as to whether or not you became attorney in fact for the taxpayers on the 20th of December, 1940?

A. No; it does not refresh my recollection at all. I have already stated that if Mr. Keesling was named in a power of attorney, I was undoubtedly named along with him, and these are simply those powers of attorney.

(Testimony of Leon Levi)

Mr. Mitchell: We offer these into evidence.

The Court: All right; they may be received.

Mr. Mitchell: Any objection, Mr. Zeitzius?

Mr. Zeitzius: None whatsoever.

Mr. Mitchell: As Government's Exhibits B and C, respectively.

The Court: All right.

Mr. Mitchell: B, Fernand Mertens, and C, Victorine.

The Court: What is the date of those, Mr. Mitchell?

Mr. Mitchell: December, 1940.

(The documents referred to were marked Defendant's Exhibits B and C, respectively, and were received in evidence.)

[DEFENDANT'S EXHIBIT B]

* * * * *

State of California)
) ss
County of Los Angeles)

SUBSTITUTION OF ATTORNEY IN FACT

Be it known that I, J. R. White of Messrs. Price, Waterhouse & Co., and resident of Glendale, California, by virtue of the power and authority to me given in and by the letters or powers of attorney of Fernand Mertens to represent him as his true and lawful agent and attorney in fact, to appear before the Bureau of Internal Revenue of the Treasury Department of the Government of the United States and to represent him in all matters pertaining to the Federal tax returns filed by him and to do and perform all and every act and thing whatsoever requisite and

(Defendant's Exhibit B)

necessary to be done in the premises, do hereby substitute and appoint Leon Levi and/or Frank Keesling of Messrs. Loeb & Loeb to do, perform and execute every act and thing which I might or could do as the attorney in fact of Fernand Mertens, hereby ratifying and confirming all that the said attorney herein made and appointed shall do in the premises by virtue hereof and of the said letters or powers of attorney.

Witness my hand at Los Angeles this 20th day of December 1940.

J. R. White

Subscribed and sworn to before me this 20th day of December 1940.

[Seal]

Elsie Evershed

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires November 18, 1943.

This is to certify that neither Loeb & Loeb nor any of its members or employees, including those mentioned in this power of attorney, have entered into a contingent or partially contingent fee arrangement for the representation before the Treasury Department of Fernand Mertens in the matter of Federal income taxes.

LOEB & LOEB

By Leon H. Levi

Joseph P. Loeb

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Deft. Exhibit B. Date 3/31/44. No. B in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [189]

[DEFENDANT'S EXHIBIT C]

* * * * *

State of California)
) ss
 County of Los Angeles)

SUBSTITUTION OF ATTORNEY IN FACT

Be it known that I, J. R. White of Messrs. Price, Waterhouse & Co., and resident of Glendale, California, by virtue of the power and authority to me given in and by the letters or powers of attorney of Victorine Catherine Renourd Mertens to represent her as her true and lawful agent and attorney in fact, to appear before the Bureau of Internal Revenue of the Treasury Department of the Government of the United States and to represent her in all matters pertaining to the Federal tax returns filed by her and to do and perform all and every act and thing whatsoever requisite and necessary to be done in the premises, do hereby substitute and appoint Leon Levi and/or Frank Keesling of Messrs. Loeb & Loeb to do, perform and execute every act and thing which I might or could do as the attorney in fact of Victorine Catherine Renourd Mertens, hereby ratifying and confirming all that the said attorney herein made and appointed shall do in the premises by virtue hereof and of the said letters or powers of attorney.

Witness my hand at Los Angeles this 20th day of December 1940.

J. R. White

(Defendant's Exhibit C)

Subscribed and sworn to before me this 20th day of December 1940.

[Seal]

Elsie Evershed

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires November 18, 1943.

This is to certify that neither Loeb & Loeb nor any of its members or employees, including those mentioned in this power of attorney, have entered into a contingent or partially contingent fee arrangement for the representation before the Treasury Department of Victorine Catherine Renourd Mertens in the matter of Federal income taxes.

LOEB & LOEB

By Leon H. Levi

Joseph P. Loeb

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Deft. Exhibit C. Date 3/31/44. No. C in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [191]

Q. You do not recall, do you, Mr. Levi, the occasion of this substitution of attorneys in fact or how the [165] substitution happened to be made?

A. I can't say that I recall. I think I know how it happened to be made. I think I probably know.

Q. If you know, I will ask you.

A. Mr. White made the substitutions, so he probably remembers better about it than I do. But I assume that it was done in order that Mr. Keesling could appear with

(Testimony of Leon Levi)

Mr. White and on behalf of Mr. White at the hearing before the Revenue Agent on the refund claims.

Q. Did you assist in preparing the refund claims?

A. No; I did not.

Q. Did Mr. Keesling?

A. No. I think they were shown to me before they were sent out to Mr. and Mrs. Gravet for signing, but I had no part in the preparation of them. That was done entirely in the office of Price-Waterhouse, and at the time that these powers of attorney bear, at the date they bear, Mr. Mitchell, it was December, 1940.

Q. The substitution was late in December, 1940?

A. The substitutions, late in December, 1940. I was then getting ready—in fact, I think I was already out of the city, but if I was not already out, I was just preparing to leave the city for a five or six months' trip. So I know nothing about those.

The Court: The exact date is December 20, 1940, on both substitutions, which are Exhibits B and C. [166]

Mr. Mitchell: Very well.

Mr. Zeitzius: Might I just interject something here? Will counsel agree that the powers of attorney are necessary to present to the Agent's Office, to the technical staff, as a condition precedent to appearing at a hearing pursuant to any written invitation coming from that office?

Mr. Mitchell: Oh, yes; so stipulated. That is the practice, and, in fact, a requirement of the department.

* * * * *

The Court: All right.

Q. By Mr. Mitchell: Mr. Levi, I call your attention to the signatures on the certificate at the bottom of each

(Testimony of Leon Levi)

of the Government's Exhibits B and C, signed, "Loeb & Loeb by Leon H. Levi" and the signature of "Joseph P. Loeb." Do you recognize the handwriting? Is that **your** signature?

A. Yes; that is my signature and that is Mr. Loeb's signature.

Q. Mr. Loeb's signature.

A. This was December, 1940. That was before I was a [167] partner in the firm and it was our custom to always have the employee's signature verified by a partner.

Q. That applies to both B and C?

A. Yes. [168]

* * * * *

J. R. WHITE,

recalled as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

(Resumed.)

The Court: All right. Let us go on.

Mr. Zeitzius: Mr. White, the witness, has handed me typewritten paper marked Exhibit 19 for identification. Will the clerk please stamp it?

(The document referred to was marked Plaintiffs' Exhibit 19, for identification.)

Q. By Mr. Zeitzius: I hand you what has been marked for identification as Plaintiffs' Exhibit No. 19. Will you state briefly what it is?

(Testimony of J. R. White)

A. This is a presentation of the tax calculations about which I spoke this morning and which I was asked to have typed in a readable form.

Mr. Zeitzius: I offer it into evidence and hand it to your Honor.

Mr. Mitchell: There is no objection. I think the witness was also going to have typed up the computation that was originally submitted to the Collector's Office and rejected by the Collector's Office on or about the 25th of August, 1938. [169]

The Witness: I have here the document I took to the Collector's Office on that day.

Q. By Mr. Zeitzius: Did you submit the document?

A. And which I left with them, and probably they have it or a copy of it, and which has the certain changes in my handwriting.

Mr. Mitchell: May I look at that? That is two pages. Will the witness prepare this in the same form as the other that has been identified?

A. I can make a copy of this, because that is prepared in the same form, you will notice, as the schedule that was sent in our letter of September 7th and which is attached to the returns, the difference being that in the one attached to the returns the item of \$40,000 is included in a column. The gratuities to the studio employees are eliminated and the deduction for medical and skin treatments has been reduced by \$775.15.

Mr. Mitchell: I have no objection to those original working notes going in, but I would like to have either this or a copy of it as a part of Exhibit 19.

The Witness: I would like, of course, to have those back eventually, and I will have copies made.

(Testimony of J. R. White)

Mr. Mitchell: They can be furnished tomorrow morning?

The Witness: Yes.

Mr. Mitchell: Very well. [170]

* * * * *

Cross-Examination

By Mr. Mitchell:

The Clerk: Will that be marked for identification for the government when it comes, or for the defendant?

Mr. Zeitzius: Mr. Mitchell requested it. We have no objection to it going in, with the witness' explanation, as he explained it.

* * * * *

The Clerk: That will be Defendant's D for identification when it is received.

Mr. Mitchell: Before the noon recess counsel handed to me the original Mervyn LeRoy agreement, a copy of the original Mervyn LeRoy agreement, dated 6th of May, 1936, [171] of which Plaintiffs' Exhibits 1 and 2 are amendatory and supplemental, which agreement, according to Exhibit 1, was assigned to Loew's Incorporated by the employer, Mervyn LeRoy; also, Exhibit A, a document that is attached to Plaintiffs' Exhibit 1 and referred to therein as Exhibit A, a contract, a proposed contract between Loew's Incorporated and the Plaintiff, Mr. Gravet, in which Mr. Gravet had the option under Exhibit 1 of exercising on or before the 15th of October, 1938. Will counsel stipulate that the option was not exercised?

Mr. Zeitzius: My best information is that that is correct, and I will therefore so stipulate. But I want to suggest that counsel's statement,—I think he agrees with

(Testimony of J. R. White)

me—that this paper which he just described is an offer to enter into a contract and, at the same time, it is the form of contract which would be signed if the offer were accepted.

Mr. Mitchell: I think that is correct. It is a part of Exhibit A, expressly made a part of Exhibit A.

Mr. Zeitzius: Of the agreement of July 29th.

Mr. Mitchell: I mean Exhibit 1.

Mr. Zeitzius: That is right.

Mr. Mitchell: Plaintiffs' Exhibit 1.

If the Court please, during the noon hour I have gone over these two documents that were handed to me by Plaintiffs' counsel and find several provisions contained in them that I think should go into the record, and therefore suggest that [172] those portions be read into the record rather than encumbering the record with the complete document, if that is satisfactory to counsel and the Court.

The Court: All right; go ahead.

Mr. Zeitzius: I would like to see the provisions first.

Mr. Mitchell: Counsel prefers that the whole document go in.

* * * * *

The Court: Very well. Mark it all for identification and then mark off the portions you want in, and then if they [173] want any part, they can offer that.

Mr. Zeitzius: May we have it back, then?

Mr. Mitchell: Surely.

Mr. Zeitzius: We will substitute a copy of it.

Mr. Mitchell: All right.

The Clerk: That will be Exhibit E for identification.

(Testimony of J. R. White)

(The document referred to was marked Defendant's Exhibit E, for identification.)

Mr. Mitchell: Defendant's Exhibit E for identification purports to be an agreement between Mervyn LeRoy of Hollywood, California, employer and first party, and Mr. Fernand Gravey of St. Cloud (Seine), France, hereinafter called 'Artist,' second party. The portions which the government desires to read into the record—

Mr. Zeitzius: Dated May 6th, Mr. Mitchell, 1936.

Mr. Mitchell: Dated May 6th, 1936. Correct.

The government desires to read that portion of paragraph 8 appearing on page 5 as follows:

* * * * *

Skipping now into paragraph 17, beginning on page 8:
Paragraph 17. [174]

* * * * *

Then, a portion of paragraph 18, appearing on page 9, [175] reading as follows:

* * * * *

Then, paragraph 20, beginning on page 9 and ending on page 10, reading as follows: Paragraph 20.

* * * * *

Now, we will ask, then, that the same thing be done in [176] respect of the document that is referred to in Plaintiffs' Exhibit 1 as Exhibit A, a proposed contract between Loew's Incorporated and Fernand Gravet.

Mr. Zeitzius: Have you had it marked for identification?

Mr. Mitchell: We will ask that this also be marked as Defendant's Exhibit F.

(Testimony of J. R. White)

The Clerk: F for identification.

(The document referred to was marked Defendant's Exhibit F, for identification.)

Mr. Zeitzius: And may it be returned to the Plaintiffs?

Mr. Mitchell: The portions of Defendant's Exhibit F for identification which defendant desires to read into the record are as follows: Page 3, a portion of paragraph 3, reading as follows:

"The producer agrees"—

I had better read the caption, however, on the top of page 1.

* * * * *

Mr. Zeitzius: May I interpose here that this statement just read is not indicative that that was ever executed, being understood that this is the offer or proposal Mr. Mitchell referred to a few moments ago. [177]

Mr. Mitchell: As not having been exercised.

The Court: Yes.

Mr. Mitchell: That is the understanding. That is correct, your Honor.

Reading, then, from page 3, a portion of paragraph 3 near the top of the page, as follows: [178]

* * * * *

Now, reading from page 4—no. Now reading from

* * * * *

page 5, a portion of paragraph 5: [179]

* * * * *

(Testimony of J. R. White)

Now reading paragraph 7 of the agreement, which begins on page 6 and ends on page 6a: Paragraph 7. [180]

* * * * *

Then, reading paragraph 19, which begins on page 17 and ends on page 17a: [181]

* * * * *

Now I have very little more, just two more portions. Now reading from the first sentence of paragraph 22, which appears at the top of page 18:

* * * * *

Then reading a portion of the first sentence of paragraph 23, on the same page 18: [183]

* * * * *

That is all that the government desires to read from those two documents.

Mr. Zeitzius: I would like to offer both of them in evidence.

The Court: All right; they may be received in evidence and you may, as part of your argument, call my attention to any other clause or clauses you want. As I understand, this was an option that he might exercise.

Mr. Zeitzius: That is right; it is an offer.

The Court: These are conditions to deal in the future.

Mr. Mitchell: That is right.

The Court: And offered merely—

Mr. Zeitzius: As a proposed contract.

The Court: —These proposals that the people contemplate, as bearing in mind in the future what their relationship might be if they exercised the option.

(Testimony of J. R. White)

Mr. Mitchell: That is the second one from which I read. The first one is the original LeRoy contract.

The Clerk: E for identification will be marked Plaintiffs' Exhibit 20 and F will be marked Plaintiffs' Exhibit 21.

The Court: All right.

(The documents referred to were marked Plaintiffs' Exhibits 20 and 21, in evidence.) [184]

[PLAINTIFFS' EXHIBIT 20]

THIS AGREEMENT made this Sixth day of May 1936 between Mr. MERVYN LE ROY of Hollywood (California) hereinafter called "EMPLOYER", party of the first part, and Mr. FERNAND GRAVEY of St. Cloud (Seine), France, hereinafter called "ARTIST", party of the second part,

WITNESSETH:

Whereas Employer is engaged in the business of producing motion pictures, and

Whereas services of Artist are of a unique and unusual character which gives them particular value and which services Employer desires to acquire,

Now, Therefore, for and in consideration of the mutual covenants and agreements hereinafter set forth, it is agreed between the parties as follows, to-wit:—

- 1) Employer hereby engages Artist and Artist agrees to
english
render his services as an actor for two Δ pictures during the

(Plaintiffs' Exhibit 20)

period starting on November 15th, 1936, and ending on November 14th, 1937. [137]

* * * * *

8) In consideration of the aforementioned Employer agrees to pay Artist the sum of \$30,000.—(Thirty thousand Dollars) for each picture, which sum is to be paid pro rata temporis, i. e. at the rate of \$3,500.—(Three thousand five hundred Dollars) a week for each of every one of the eight weeks.

Artist has the right to terminate work immediately in the event that he should not receive his payment regularly.

Employer agrees furthermore to furnish Artist and an accompanying person with first class passage and railroad round trip tickets from Paris (France) to Hollywood (California).

Employer furthermore agrees to pay all taxes which Artist may be assessed in the United States, but not his taxes in France, and only for such sums which Artist derives from his employment through Employer. [141]

Artist agrees that Employer pay 10% (ten per cent) of any sums due to him as salary directly to his agent Mrs. Adeline Schulberg and that for the relations between Artist and Employer such payments shall be deemed as to have been made to Artist. [143]

* * * * *

17) Artist hereby grants to Employer an option for his further services for additional four years after the expiration of this contract, viz. for the time beginning November 15th, 1937 and ending October 14th, 1941, for additional three motion pictures a year under the same

(Plaintiffs' Exhibit 20)

terms and conditions as those cited herein except that the consideration for such further performances shall be \$35,000.—(Thirty-five thousand Dollars), \$40,000.—(Forty-thousand Dollars) and \$45,000.—(Forty-five thousand Dollars) for the first year, \$50,000.—(Fifty thousand Dollars) each in the second year, \$60,000.—(Sixty-thousand Dollars) each in the third year and \$75,000.— [144] (Seventy-five thousand Dollars) each in the fourth year.

The option, which must be exercised from year to year, is to be lifted by Employer by way of sending Artist a registered letter to that effect not later than sixty days before the expiration of the previous contract. This letter is to be addressed to the last address designated by Artist and if no address has been designated to No 2 rue de Buzenval St. Cloud (Seine) France, and shall be deemed as having been given in time if it has been posted before the commencement of that period of sixty days, i. e. it must have been posted not later than September 15th of each year.

18) Artist may refuse to accept the option, but in this event he may not make an English speaking motion picture for any firm, person or corporation before November 15th, 1941.

* * * * *

20) Should any dispute or controversy arise between the parties hereto with reference to this contract or the employment herein provided for, such dispute or controversy shall be referred for determination to a committee consisting of five foundation members of the Actor's Branch of the Academy of Motion Picture Arts and Sciences,

(Plaintiffs' Exhibit 20)

which committee is to be selected by the Executive Committee of the Actor's Branch of said Academy of Motion Picture Arts and Sciences. Either party to such arbitration may appeal from the decision rendered by such [145] committee, and in such event the dispute or controversy between the parties hereto shall be determined by the Conciliation Committee of said Academy of Motion Picture Arts and Sciences. Any arbitration hereunder shall be conducted in accordance with the by-laws of said Academy of Motion Picture Arts and Sciences, and in accordance with such rules as may from time to time be formulated by said Academy of Motion Picture Arts and Sciences.

* * * * *

[Endorsed]: Case No. 3002. Mertens vs. Rogan et al. Pltf. Exhibit 20. Date 3/31/44. No. 20 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [146]

* * * * *

Mr. Mitchell: Copies may be substituted for the originals; no objection.

The Court: All right; go ahead.

Q. By Mr. Mitchell: Mr. White, I believe you testified yesterday that Mr. Melbourne went with you in June, 1938, and paid the tax reported in Mrs. Mertens' return; is that correct, in June, 1938?

A. Yes; that, I believe, is.

Q. Mr. Melbourne is with Loew's Incorporated?

A. Mr. Melbourne was an employee of Loew's Incorporated and he handled the tax and insurance matters for that corporation.

(Testimony of J. R. White)

Q. And who else was with you at that time besides Mr. Melbourne and Mr. Mertens?

A. Mrs. Mertens, Mrs. Schulburg, who was Mr. Mertens' agent. The time of the payment I don't remember whether Mr. McDonald went down to the cashier's window with us or whether Mr. Ogden did, one of the two did.

Q. Was the question discussed then as to whether or not the tax should be paid on that particular payment by Loew's Incorporated, of the \$3,000 some odd dollars that were then paid to procure Mrs. Mertens' sailing permit?

A. There was no question but that Loew's was to [185] furnish the money and I am sure—I don't know that they did, but I believe they furnished the money to Mr. Melbourne.

Q. Was anything said at the time of your conference with Mr. Ogden or Mr. McDonald, deputy collectors, concerning the approaching or then controversy as to whether or not that tax payment should be included in the income of Mr. and Mrs. Mertens for that particular period?

Mr. Zeitzius: May I ask whether you mean the \$3,200 item?

Mr. Mitchell: The \$3,000 some odd dollars that was paid by Mr. Melbourne to the cashier in June, 1938.

The Witness: Am I free to answer?

The Court: Yes.

The Witness: Would you mind reading the question, please?

The Court: Read the question please, Mr. Bargion.
(Question read by the reporter.)

A. No.

(Testimony of J. R. White)

Q. By Mr. Mitchell: And it was not then included in your return?

A. That is correct; it was not then included.

Q. It was not included in the return of June, Exhibit 3 in this case?

A. I do not remember the exhibit number, but it was not included in the information on which Mrs. Mertens' sailing permit was issued, and there was no tax added to [186] the income on which her sailing permit was issued.

Q. Did you hear Mr. Levi testify this morning that he was introduced to Mr. Mertens sometime in about August, 1938?

A. Yes; I did.

Q. Did you make the introduction?

A. No; I didn't make the introduction.

Q. Were you present? Do you know where that introduction took place?

A. No. I was with Mr. Levi at one time when we were both introduced to Mr. Gravet, but I had met him before and I thought at the time that Mr. Levi had met him before. I assumed that he had.

Q. During your conversations with Mr. Mertens or Mrs. Mertens in June was the subject of their 1937 tax returns discussed?

A. Yes; it was.

Q. What, if anything, was stated in that regard?

A. The conversation was held at Mr. McDonald's desk in the Collector's Office and Mr. McDonald referred to a—I believe it was a card index record which showed that Mr. and Mrs. Mertens had been in the country before. My recollection is that he told me that the card record showed that he had been in the country before and that they had been issued sailing permits before, or departure

(Testimony of J. R. White)

permits, when they left the country, and at that time they were taxed [187] as non-resident aliens because they had come in under what is known as the visitors permits.

Q. I see.

The Court: Go ahead.

A. I think also that there was discussion with them that they had left the country so as to come back in under the quota, which I believe has to be done.

Q. By Mr. Mitchell: You did not receive your power of attorney from Mrs. Mertens until the 24th of June, is that correct?

A. I don't have a record of the date it was received, but the power of attorney I have shows that it was executed on the 24th of June, 1938.

Q. And it was in pursuance of that power of attorney that you appeared for Mrs. Mertens at the Collector's Office on that occasion?

A. It is my understanding and it was my understanding at the time that a power of attorney was not required for a person to assist a taxpayer in filing a return or securing a sailing permit, but that the Collector's Office will talk to anyone, whether they have a power of attorney or not. This power of attorney—these powers of attorney from Mr. and Mrs. Mertens were secured at that time so that I or other representatives of Price-Waterhouse would be able to discuss these tax cases with the Treasury Department.

Q. You anticipated that there might be a controversy [188] at that time, did you not?

A. Yes; we anticipated there might be a controversy.

Q. And you wanted a power of attorney to be prepared for that?

(Testimony of J. R. White)

A. We wanted—in all tax cases where we represent or appear before the Treasury Department for taxpayers we are required to have a power of attorney, whether we do anything under it or not.

Q. Mr. White, on December 20, 1940, the evidence shows that you surrendered, or, rather, transferred your power of attorney under the substitution clause to Mr. Levi and Mr. Keesling.

Mr. Zeitzius: May I interrupt? Does counsel mean that the evidence shows he surrendered it, or merely appointed him?

Mr. Mitchell: Transferred it.

Mr. Zeitzius: No. I don't place that construction on it.

The Court: A substitution of attorneys.

Mr. Mitchell: A substitution is what I mean.

The Court: That is what they call it. All right.

A. At or about that time there was to be a conference with the Treasury Department on this matter at which—

Q. By Mr. Mitchell: About what time, the date of the substitution?

A. At or about December, 1940. I have forgotten the exact date of the conference, but there was to be a conference [189] with the Treasury Department on these matters, and Mr. Keesling or Mr. Levi were to attend the conference with me, and in order to do so they had to have some evidence of authorization and, as is the practice in these cases, why, when that is needed a substitution of attorney in fact was filed, and after that has been filed the Treasury Department will allow a person to sit into the conference and partake of the discussion.

(Testimony of J. R. White)

Q. Yes.

A. That was the sole reason for filing the substitution; and I did not regard it in this case or any other case as surrendering my rights under the power of attorney.

Q. The original power ran to three members of the firm of Price-Waterhouse and you were the only one who appointed substitutes, is that correct?

A. That is right. It ran to Mr. Sutherland, in our Washington office, and myself and Mr. Wilson who was my assistant.

Q. Who paid your compensation for services rendered in respect of the June return of Mrs. Mertens?

A. You mean my personal compensation or Price-Waterhouse?

Q. Yes; Price-Waterhouse.

A. Of course, I was employed by Price-Waterhouse at the time and I was paid by Price-Waterhouse for my services. We were engaged by Loew's Incorporated to act as independent [190] accountants in this matter in assisting the Gravets, and we were paid by—we submitted our bills and they were paid by Loew's Incorporated.

Q. And that includes all of the services that you have ever rendered in connection with this controversy, or Price-Waterhouse?

A. Excepting recently. We haven't sent them a bill since the last conference or date of the last assistance we rendered prior to this case.

Q. Was Mr. Levi present at the September 7, 1938, conference in the Collector's Office?

A. Not to the best of my recollection.

(Testimony of J. R. White)

Q. Mrs. Mertens was in France in September, 1938?

A. I don't know.

Q. She was not present in the Collector's Office?

A. I only saw Mrs. Mertens on one date.

Q. That was in June?

A. In June, at the Collector's Office; yes.

Q. Did anyone make any statement during the conference that Mrs. Mertens was not present? I notice from Plaintiffs' Exhibit 7 the return of Mrs. Mertens was signed by whom?

May I see Exhibit 7, Mr. Clerk, please?

Were you present when Plaintiffs' Exhibit 7 was executed on behalf of the taxpayer? This is the Form 1040C, departing alien return, filed in the name of Victorine Mertens. [191]

A. Yes; I was present at that time and Mr. Mertens signed it. I believe he had a power of attorney to do so.

Mr. Mitchell: I see.

Mr. Zeitzius: That was filed in September?

Mr. Mitchell: September 7th.

Mr. Zeitzius: I may not have caught it. I was thinking you were talking about June. As I understand, she herself signed the June return.

Mr. Mitchell: Oh, yes. This is Exhibit 7.

A. To answer the other part of your question, the first part of your question, everyone there assumed that she was in France in September.

Q. Will you state again who paid the cash to the cashier in the Collector's Office on September 7th? Did Mr. Melbourne make that payment at that time also?

A. Mr. Melbourne brought the cashier's checks to the Collector's Office with some cash and they were refused,

(Testimony of J. R. White)

and the telephone calls were put through and messengers were sent to the bank to get an equivalent amount of cash. I don't think the bank—the bank did not require the checks to be returned before they sent the cash. And it is my recollection, which is a little bit hazy, true, but it is my recollection that the cash was delivered to Mr. Melbourne and that he physically turned it in at the window.

Q. Do you know who sent for the messengers, which particular individual that was present at the time? Was it [192] Mr. Melbourne?

A. Yes. I think Mr. Melbourne called the studio. It is my recollection he called the studio and explained the trouble we were in and made the arrangement.

Q. And then a messenger was sent, you say, by whom? Who sent the messenger to the bank to get the cash, if you know?

A. I am sure it was someone from the accounting department, the cashier's department at Loew's.

Q. Mr. Mertens did not procure the cash, did he?

A. No. The cash was procured by Loew's I am sure.

Q. I believe you testified that you prepared the refund claims, Plaintiffs' Exhibits?

A. Yes; I prepared the refund claims.

Mr. Zeitzius: 9 and 10.

Mr. Mitchell: 9 and 10, yes; that is correct.

A. That is right; I prepared them.

Q. And prepared the schedules and other documents attached to the claims? A. Yes.

Q. When did you prepare those claims?

A. They were completed and I signed the affidavit attached to them, affidavit of preparation, on May 2nd, 1939.

(Testimony of J. R. White)

Q. And then you sent them to France to be verified by Mr. and Mrs. Mertens?

A. I believe at first they were sent to Mr. Levi for [193] his review and approval as to legal form and so forth. They involved a legal matter and we invariably, whenever any tax matter has any legal point, ask the attorneys for our clients or taxpayers to pass on them. I believe they went to Mr. Levi first.

Q. In this case you went to Mr. Levi of Loeb & Loeb?

A. That is correct.

Q. After he approved the copy, then you forwarded it to France?

A. We sent them to Mr. Mertens in France, addressed them in France on May 15, 1939.

Q. And when did you receive them back? I notice they are verified by Mr. and Mrs. Mertens on the 6th of June, 1939, before the vice consul in Paris?

A. I believe it was sometime in June, 1939.

Q. You testified yesterday also to discussions in the Revenue Office and also in the technical staff office—the Revenue Agent's office, rather, and the office of the technical staff regarding the refund claims and certain propositions being made by the Revenue Agent or the technical staff representative if the taxpayers were to concede the major issue, why, the government would concede certain items of deduction. Do you recall that testimony?

A. Yes. I don't know that I used the word "propositions." I think if I did that, the Treasury Department—

(Testimony of J. R. White)

Q. Well, the major claim. [194]

A. The Treasury Department people might object to my use of the word "proposition." But I did testify to that.

Q. That was done in connection with an endeavor of you, as representatives of the taxpayers, and the government agents, as representatives of the government, in an endeavor to settle the controversy once and for all, was it not?

A. Yes. That was an attempt to—I would say, an attempt to settle it without further controversy.

The Court: Adjust a controversy, put it that way.

A. Adjust the controversy. But, of course, we were not willing—

The Court: To concede anything.

A. —to concede anything.

Mr. Mitchell: Your major contentions—

The Court: You found there was nothing to adjust. All they wanted was to adjust the minor matters if you conceded the correctness of that application of that \$40,000?

A. That is right. And, of course, we would have conceded all of the minor matters, if they would have conceded the large ones.

The Court: If they would have conceded the others?

A. That is right.

Q. By Mr. Mitchell: These various items that were discussed in this bargaining, they did not state to you that [195] they had been investigated and verified, did they?

A. As far as the item of gratuities to the studio employees, yes. They said that it was, definitely, stated to

(Testimony of J. R. White)

me that we, of course, will allow those deductions now. As far as the medical expense for the skin and beauty treatments, or that sort of thing, they told me that they still did not allow those types of items; they considered those to be personal items.

Q. I see.

A. As to the allowance of personal exemption, why, if the tax was going to be computed for the whole year, why, yes; it would be done on that basis.

Q. In June, 1938, Mr. Mertens personally did not employ you to represent him, did he?

A. No, sir.

Mr. Zeitzius: When?

Mr. Mitchell: In June, 1938.

Q. And neither did Mrs. Mertens? A. No, sir.

Mr. Zeitzius: I move to strike out the two statements by counsel, because I think the stipulation of facts, joint Exhibit 1, clearly shows that Mr. and Mrs. Mertens, we agree, signed the powers of attorney to Mr. White on June 24, 1938; and I think that the evidence, therefore, by admission, clearly is that he was employed in June, 1938, despite counsel's remarks and the witness' answer just given. [196] I move to strike out the remarks or the questions of counsel and the answers.

Mr. Mitchell: This is cross examination if the Court please.

The Court: Well, I think it is going a little far afield. I will sustain the objection.

Q. By Mr. Mitchell: Neither Mr. nor Mrs. Mertens ever paid you anything for acting for them in June, 1938, did they? A. No, sir.

(Testimony of J. R. White)

Q. Nor at any other time?

A. No, sir.

Mr. Zeitzius: I move to strike out the last two questions and answers on the ground it is immaterial and there is a presumption of law, I think, which we are entitled to rely on in that connection, unless the Court is merely allowing it as part of a broad cross examination.

The Court: I will allow it. I cannot see why when two persons are interested in the tax payment of one person and one has assumed the obligation to pay it, whether he is ever reimbursed or not, I cannot see why they can't exchange consultations or advice, or even one pay the expense of the lawyer or of the accountant, especially when the one who does it is an American corporation used to American methods and the others are French artists—not only artists, but French artists and, judging by the only English letter he [197] wrote, with a very, very, imperfect knowledge of the English language. So that in itself it does not mean anything at all. It might be that at times such a relationship might bear upon good faith of the parties, but in this particular case I do not think it is of any great importance, one way or the other.

However, I have no objection to his testifying to the fact, because I assume that in all these cases, being especially a foreign artist, they assumed the obligation. I think the government probably would kick if they did not, because, not that they are obligated to withhold, but it might probably be if they did not protect them and retain it at the source. You know, the government forced the system of retaining at the source, a voluntary system, long before we had an actual system, by merely asking for cooperation, and they got it.

(Testimony of J. R. White)

Q. By Mr. Mitchell: Mr. Ed Schulberg, I believe you testified, attempted the June 21, 1938—

* * * * *

Q. My Mr. Mitchell: I believe you stated Mrs. Schulburg attended this June 21, 1938, conference at the Collector's Office? [198]

A. That is correct.

Q. Did she appear at any of the other conferences at the Collector's Office?

A. Not that I remember.

Q. Do you know whether prior to June 24, 1938, Noel Singer, certified public accountant, then of 417 South Hill Street, Los Angeles, was Mr. Mertens' attorney in fact in tax matters?

A. As far as I know he was not.

Q. You don't know of your own knowledge?

A. I don't know of my own knowledge, except that we were never required to get a letter showing that he had been dismissed, which is the practice of the Treasury Department when a power of attorney is filed.

Q. Did you ever before this trial see the originals of Plaintiffs' Exhibits 1 and 2 which I hand you?

A. I heard Mr. Levi testify that these were exhibited to Mr. Ogden, testify this morning that these were exhibited to Mr. Ogden at our conference in August, and I assume that I saw them at that time.

Q. What is that?

A. I assume that I saw them at that time. I know that the terms—

Q. Have you any independent—

A. I know that the terms and the wording were explained to him and I know that they were explained to me,

(Testimony of J. R. White)

but I have [199] no definite recollection of having seen these before.

Q. You have no recollection of seeing them at the Collector's Office?

A. I have no definite recollection of having seen these original agreements before.

Q. Or any copies of them?

A. Or any full copies of them. I may have seen parts of them.

Q. Extracts? A. That is right.

Q. Who showed them to you?

A. Just a minute. I happened to think of something. I am incorrect. I have seen copies of those agreements and copies of those agreements were received in our office on August 9, 1938, from Mr. Levi.

Q. Sent to you by Mr. Levi?

A. Sent to us by Mr. Levi.

Q. August 9, 1938. What did you do with them?

A. August 9, 1938. I used those as a basis of preparing some estimates of the amounts of the total cost to Loew's of compliance with these agreements under various assumed circumstances, and then returned copies of the agreements to Loeb & Loeb.

Q. Did you ever before this trial see the Mervyn LeRoy contract of 1936?

A. Could I see the contract to see what it looks [200] like?

Q. Yes; here it is. It is Plaintiffs' Exhibit 20, a copy of it.

A. I think I have seen a copy of this before.

Q. When did you first see it, Mr. White?

(Testimony of J. R. White)

A. Well, it would be between June and August in 1938.

Q. Did you read it at that time?

A. I undoubtedly read the parts of it which had to do with the payment of taxes, because that information was necessary in preparing the data to be submitted to the Collector's Office. I am sure I would have read that part of it, or at least had that part explained to me.

Q. Returning to Exhibit 1, the Plaintiffs' Exhibit 1, the contract of July 29, 1938, did you ever see Exhibit A which was attached to that contract, referred to in paragraphs 3 and 4 of Exhibit 1?

A. Yes. I received that at the same time that I received a copy of the Exhibit 1.

Q. Did you read it?

A. I presume so, or at least the parts which I was required to read in order to make the computations.

Q. I believe you testified yesterday that Mr. Ogden or Mr. McDonald rejected your first computations that were submitted before August 30, 1938, and that you then wrote a letter to Loew's as to what had taken place, as I understood your testimony yesterday. How did you happen to write to [201] Loew's Incorporated? What had taken place?

A. As I testified earlier, we were engaged by Loew's Incorporated to assist Mr. Mertens in getting his sailing permit, and after we had learned the requirements of the Collector's Office as to what would have to be paid, I wrote to Loew's and told them what the requirements were so that they would have ample warning that they would have to have Mr. Gravet down at the Collector's Office on such and such a day, and that they would have to have

(Testimony of J. R. White)

present sufficient cash to pay his taxes, or the equivalent, so he could get out of the country.

Q. And did you write a similar letter at the same time to Mr. Mertens? A. No, sir.

Mr. Mitchell: May I see Exhibit 5 a moment, Mr. Clerk?

Q. Calling your attention, Mr. White, to Plaintiffs' Exhibit 5, the pages are numbered in longhand in the lower right hand corner, I call your attention to page numbered in the lower right hand corner A-4, and call your attention to an item under "Business Expenses:" with the word "Less" in front of it, evidently a list of deductions, reading:

"Commission Paid Agent \$12,437.50."

Do you find that entry? A. Yes, sir.

Q. Did Mr. Mertens tell you that the agent to whom such commission was paid was Mrs. Schulburg? [202]

A. I don't recall whether he told me that or whether she did or exactly who told me that it was.

The Court: Sometimes the contract calls for payment direct by the producer to the agent of the agent's percentage.

* * * * *

Q. You do know Mrs. Schulburg was the agent to whom that commission was paid, Mr. White?

A. She was the agent and, at our joint visit to the Collector's Office, she acted as agent and they acknowledged that she was agent; and I see I have a note in my working papers here that at that time the commission paid to her was \$4,300—no; that the commission paid to her was \$437.50 on the Warner Brothers salary.

(Testimony of J. R. White)

Q. At what time was that? [203]

A. This was in June.

Q. In June. I see.

A. And you will note that the rest of the commission of \$12,000 is 10 per cent of the \$120,000 income.

Q. Yes.

* * * * *

The Witness: I find a note here that reminds me that I told Mr. Mertens that he should file an information return, Form 1099; for Mrs. Schulburg. I see a note here that I told him that.

Mr. Mitchell: That is pretty good advice.

Q. Did you ever have any conversation with Mr. Melbourne concerning the refund claims that were filed in this case?

A. I don't recall any specifically, but there would be no necessity for that except that he would call up and ask if the claims had been filed or if they had not been filed.

Q. Your conversations in that connection were usually with Mr. Levi? A. That is correct.

Q. Now calling your attention to Exhibits 6 and 8, [204] do you know where the originals of these white photostats are, Mr. White?

A. The last I saw of the originals of these they were turned in at the window at the cashier's office.

Q. No. These are the taxpayers' copies. These are the taxpayers' copies, Mr. White, not the original returns, as you note on the back.

The Court: These are the working sheets?

Mr. Mitchell: No, your Honor. This is the notice of termination and certificate of compliance or sailing permit that is attached to the taxpayers' copy.

(Testimony of J. R. White)

A. It is my recollection that the Forms 1040C were turned in at the cashier's window.

Mr. Mitchell: That is right.

A. By Mr. Ogden, and at the time the money was paid they were stamped and that Mr. Mertens was given, probably, a small piece of paper. I think that that is true. It may have been that he was given back these, because they are photostatic copies, and I don't know where these were obtained from.

Q. You did not furnish counsel for the plaintiffs with these photostats?

A. I furnished counsel for the plaintiffs with one, a photostat of one of these returns which I had received some months back, or years back, I believe from Loeb's.

Q. Which was that? [205]

A. Oh, I did not have any of these prepared.

Q. Which one was it?

A. It was the 1040C filed by Mrs. Mertens before her departure from the country in June, 1938.

Q. Is that Plaintiffs' Exhibit 4? That is the original of Plaintiffs' Exhibit 4 which I hand you.

A. Yes; this is it. I can identify it because of it coming out of our file. I am pretty sure that is it, and the other two, you see, have never been in our file.

Q. You say you did have the original or it was furnished you?

A. No. This was furnished to us.

Q. Oh, I see, this white photostat.

A. That is right.

(Testimony of J. R. White)

Q. And then did you furnish it to counsel in this case?

A. I delivered this to counsel about 10 days before I received your subpoena.

Q. And the exhibits 3 and 4, however, you do not know where those photostats came from?

A. I don't recall ever seeing those until in court here.

Mr. Mitchell: All right. Will counsel stipulate as to the origin of these exhibits 6 and 8? I don't imagine there is any reason to hide it. I would, though, like to get in evidence the history of how they came into possession of Plaintiffs' counsel. [206]

Mr. Zeitzius: Well, you will remember that I had them with me when I discussed the stipulation with you on three different days.

Mr. Mitchell: That is right.

Mr. Zeitzius: And you and I looked them over carefully together and I extracted two of them from the office file, which I gather Mr. Levi had built up.

Mr. Mitchell: You refer to the office file of Loeb & Loeb?

Mr. Zeitzius: Of the Mertens case, of the Mertens case.

The Court: In your office?

Mr. Zeitzius: Yes; Loeb & Loeb.

The Court: Loeb and Loeb filed them.

Mr. Zeitzius: That is right. I don't know how they got there, though. In other words, I learned from Mr. Mitchell about the June return, I think, I don't know just how I learned it. In trying to get the facts, why, I had

(Testimony of J. R. White)

to get information from all sources to get the papers together.

The Court: All right, Mr. Mitchell.

Q. By Mr. Mitchell: Have you heard from Mr. Mertens since the refund claim was filed?

A. No; we haven't.

The Court: What is the date of the refund filing?

A. It was filed in 1940, I believe.

Mr. Zeitzius: March 5. [207]

* * * * *

The Witness: March 5, 1940; that is correct.

* * * * *

GEORGE A. WARREN,

called as a witness by and on behalf of the Plaintiffs and Cross-Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Zeitzius:

Q. Your name is George A. Warren?

A. That is correct, sir. [208]

Q. And your residence, please?

A. Beverly Hills, California.

Q. You are employed by whom?

A. Loew's Incorporated.

Q. For how long have you been so employed?

A. I entered the employ of Metro-Goldwyn-Mayer Corporation in the latter part of November, 1937. As of January 1, 1938, the assets and the operations of Metro-Goldwyn-Mayer Corporation were taken over by Loew's Incorporated and I have been in their employ since.

(Testimony of George A. Warren)

Q. What is your present position?

A. Chief accountant.

Q. What was your position in 1938?

A. The early part of 1938 I was—well, you might say, co-supervisor of the accounting department along with the gentleman in charge of the accounts and accounting and auditing. Mr. Newman operates the office and the office personnel.

Mr. Mitchell: If the Court please, if the only thing counsel desires to prove by this witness is that the taxes, the \$37,000, or whatever the amount is that were paid as taxes for these taxpayers in 1938, were carried on the books of Loew's Incorporated as a loan, I will so stipulate.

Mr. Zeitzius: Well, that is substantially what I want. And I would like to offer into evidence—

The Court: There should be a stipulation also that they [209] were entered on the date of the payment and were in the books kept for that purpose.

Mr. Zeitzius: That is right, I want that, too; that it was kept on a ledger sheet called the 4 B account to which loans to contract employees were posted.

The Court: All right.

Mr. Mitchell: I can't stipulate as to the date that the entry was made.

The Court: Let the copy of the ledger sheet show the date. Just identify the ledger sheet or sheets and introduce them.

Q. By Mr. Zeitzius: May I ask whether you have the ledger sheet with you? A. Yes.

Q. Covering the matter about which we are speaking here? A. Yes.

(Testimony of George A. Warren)

Mr. Zeitzius: All right. I shall ask the clerk to mark this sheet for identification, or I offer it into evidence as the ledger sheet produced by the witness, I having here a photostatic copy of it, Mr. Mitchell now looking at the copy from which it is made.

The Court: All right.

The Clerk: Plaintiffs' Exhibit 22.

(The document referred to was marked for identification as Plaintiffs' Exhibit 22.) [210]

Mr. Zeitzius: I think we have everything that we need, your Honor, by this witness.

The Court: All right.

Mr. Zeitzius: We have that stipulation of counsel that it was posted to the 4 B account, which is a loan account.

The Court: All right, step down.

Mr. Mitchell: I have not cross examined the witness yet.

The Court: Do you want this exhibit?

Mr. Mitchell: Have you an extra copy?

Mr. Zeitzius: I have two photostats only and one is in evidence.

Cross-Examination

By Mr. Mitchell:

Q. Mr. Warren, where is the balance of Mr. Gravet's ledger account? A. The balance?

Q. Where is the rest of it?

A. This is all of it.

Q. You put nothing but—

The Court: You mean another ledger account other than the tax account? His ledger sheet shows the amounts he has drawn, chargeable against his salary.

(Testimony of George A. Warren)

The Witness: We do not carry ledger sheets. I have the copy of the vouchers where the payments were made to him. They are charged against the expenses. This is, pure and [211] simple, an accounts receivable ledger sheet.

The Court: Do you want to see those vouchers?

Mr. Mitchell: No, your Honor.

Mr. Zeitzius: We will stipulate, Mr. Mitchell, that this witness would testify and back it up with original vouchers showing that they paid the entire \$120,000 that you and I stipulated by September 14, 1938, and that in addition there was some \$1,200 in taxes paid during 1938, as shown in the schedule attached to the refund claim immediately under the \$120,000 income item, and that that is all that they show as compensation paid to Mr. Gravet on their books.

Mr. Mitchell: I am not stipulating regarding this additional item, because I do not think it is involved in the case. I do not think it is material, the additional California income tax.

Q. Mr. Warren, where are the vouchers or data from which the first item is taken, referring to Exhibit 22?

A. That is \$3,245.92?

Q. That is right.

A. It was furnished to Mr. Melbourne—I do not have the 4 C—in cash by our cashier. This is the receipt for the refund of the difference, I believe, with copy of the receipt from the Collector's Office, accounting for the \$3,245. It must have been \$3,500.

The Court: I think you had better speak a little louder.

A. It must have been \$3,500, because the sum of these [212] amounts, \$3,245 and \$255, equals \$3,500, and

(Testimony of George A. Warren)

the \$255, that is the sum which Mr. Melbourne returned to the cashier's office.

Q. By Mr. Mitchell: A certain amount was taken to the Collector's Office?

A. Taken to the Collector's Office.

Q. And it was not all necessary to be used?

A. That is correct.

Q. Which is reference "J1993." Let us take the next item, "J15" under the date September 7.

A. This is journal entry here, originally \$40,000, we drew a check to the Bank of America. This is the voucher portion of the check. I have the original check here somewhere.

Mr. Zeitzius: Here is the photostat, if it will expedite the matter.

A. In the amount of \$40,000, for which the cashier, on instructions, received a check, a cashier's check in the amount of \$17,000, another cashier's check in the amount of \$19,000, and cash to the extent of \$4,000, which were turned over to Mr. Melbourne by the cashier.

Q. By Mr. Mitchell: Will you point out to me on this—is this "J15"?

A. No. This is the voucher wherein the \$40,000 was drawn which was charged to "41-1," meaning carried in suspense until proper disposition of that item could be [213] determined.

Q. When you say "proper disposition of that item could be determined" what do you mean?

A. As to how much of it would be used, how much of it would be returned and what should be—

(Testimony of George A. Warren)

Q. How it should be entered in the books?

A. And how it should be entered in the books. Here is "J15" crediting this cash out of 41-1 and charging Fernand Gravet's 4 B which is accounts receivable.

Q. What do you mean by the stamp punched "September 7, 1938"?

A. We operate on punch-card tabulating machines. Journal entries are prepared daily, are put together at periodic intervals throughout the day, with a control total both in debits and in credits.

Q. Daily control?

A. Daily control, or in fact, at periodic intervals throughout the day, so that each batch and each card is controlled. They are sent to the tabulating department and the tabulating department punches them and punches a tabulating department card which forms the basis for our accounting. [214]

* * * * *

Q. By Mr. Mitchell: May I refer again to this "J1993" which you showed me a little while ago? Can you tell me when this entry was made, debit Fernand Gravet?

A. Actually it was made on June 28th, punched as of June 27th. Without a calendar I could not say for sure, but I am judging the way we operate, that all entries up to noon as of today reflect yesterday's work, and are punched as of yesterday, so there is a discrepancy there.

Q. By the Court: What date was that in June?

A. June 28, 1938.

Q. That was Monday? Oh, no, 1938. No; it would not be.

A. It could be any day during the week.

(Testimony of George A. Warren)

The Court: This does not go back that far.

Mr. Mitchell: Let the record show I am reading from Journal No. 1993. Let the record show that the inter-office communication dated June 27, 1938, reads as follows:

"Mr. Craig decided that we should treat the amount of tax paid for Mrs. Gravet as an advance or loan. We will also treat the taxes paid for his account when he leaves as a loan or an advance. This situation comes about because a supplementary agreement is being entered into with him making this possible, according to Leon Levi. Signed J. A."—what is that? [215]

A. An "M" that would be.

Mr. Mitchell: "J. A. M.", that is for Melbourne.

Q. What agreement was to be supplemented? Do you understand that reference?

A. That I don't know. It is possible he has reference to the agreements of—is it July 29th?

Q. July 29, 1938; yes.

The Court: All right.

Mr. Mitchell: All right. May I just look at that other September 7 journal entry?

The Witness: Surely.

Mr. Mitchell: Let the record also show that there is an endorsement on journal number 15, dated September 7, 1938, in longhand, reading as follows:

(Testimony of George A. Warren)

“Accounted for by photostatic copies of sailing permit attached to Gravet file:

Checks	\$36,000
Cash	\$1,073.27
Total	\$37,073.27
Cash Returned	\$2,926.73
Total	\$40,000.00

Receipts O.K. September 16, 1938.”

Mr. Zeitzius: May I just ask this:—

The Court: Have you completed it? Have you completed, Mr. Mitchell?

Mr. Mitchell: I think so, yes, your Honor. [216]

The Court: All right.

Mr. Zeitzius: I just have this one point, in view of the difficulty in arriving at figures. I want to ask the witness whether he knows whether the figures 40,319.19, the balance shown on Plaintiffs’ Exhibit 22 as of September 7, 1938, includes an amount of \$301.78 for taxes that were paid with respect to the French income of Gravet in 1938?

The Witness: It includes everything that was paid on September 7th or the taxes for Mr. Gravet, which would include the \$300-odd.

* * * * *

Q. By Mr. Zeitzius: This is the present state of this account? A. It’s present state.

Q. And that is the balance shown owing Loew’s Incorporated?

A. That is the balance owing Loew’s Incorporated.

Q. And still due on our books? A. Yes.

(Testimony of George A. Warren)

Mr. Mitchell: By the way, I might ask one other question, if the witness knows.

Q. By Mr. Mitchell: Have you heard from Gravet, or has Loew's Incorporated heard from Gravet since the refund [217] claim was rejected?

A. At what date was the refund claim rejected?

Mr. Zeitzius: 1941.

Mr. Mitchell: About.

The Court: I could take judicial notice that war was declared in September.

Mr. Mitchell: France was occupied from May, 1940. I believe the Court will take judicial knowledge of that.

The Court: Well, yes, but France was at war in September, 1940. In September was the invasion of Poland. I happen to remember that.

Mr. Mitchell: September 29th.

The Court: Because my children were in Paris when the war was declared.

Mr. Mitchell: And France was invaded the following May, 1940.

The Court: I know, but I mean France was in a state of war from September 5th, I think, 1940, isn't that correct?

Mr. Mitchell: September, 1939.

Mr. Zeitzius: 1939, I think.

The Court: 1939, that is right.

Mr. Zeitzius: The refund claim was rejected July 11, 1941, according to our stipulation.

Mr. Mitchell: What was your answer, Mr. Warren?

A. To the best of my knowledge, no. [218]

* * * * *

(Testimony of George A. Warren)

Mr. Zeitzius: The only thing I want to do is to offer the two assessment lists. I have nothing further.

* * * * *

Mr. Zeitzius: I first offer the assessment, a certified copy from the government of the original assessment list, signed by the Commissioner of Internal Revenue by the Acting Commissioner, at Washington, D. C., on November 4, 1938, certifying and assessing the tax of \$3,245.92, which was paid on June 21, 1938.

The Court: All right.

The Clerk: Plaintiffs' Exhibit 23.

Mr. Mitchell: That is Exhibit what?

The Clerk: 23.

Mr. Mitchell: All right.

(The document referred to was marked Plaintiffs' Exhibit 23, and was received in evidence.)

[PLAINTIFFS' EXHIBIT 23]

United States [Crest] of America
TREASURY DEPARTMENT
Washington

March 22, 1944.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed are true copies of Assessment Certificate of that portion of the July 1938 Supplemental Income Tax Assessment List—California collection district—showing an assessment of \$3,245.92 for the period from January 1, 1938 to June 30, 1938, against Victorine Mertens Renourd

(Plaintiffs' Exhibit 23)

Fernand Gravet), Los Angeles, California, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury.

[Seal]

F. A. Birgfeld,

F. A. Birgfeld,

Chief Clerk, Treasury Department. [180]

ASSESSMENT CERTIFICATE

[Stamped]: Internal Revenue Received Aug 8 1938
By Proving Section

6th District of California Month July Year 1938
Income Tax Division

Lists as to tax and payments compared and found to agree with sectional control ledgers.

F. F. Fichthaler,

Chief of Division

T G Albright,

Comptroller Bookkeeper.

I Hereby Certify that the individuals, firms, and corporations reported by me on the attached lists are liable for the amount of taxes, penalties, etc., entered opposite their names, and that the amounts thereof are as follows:

Dated at Los Angeles California

Office of Collector of Internal Revenue August 3rd,
1938

Nat Rogan

Collector of Internal Revenue

(Plaintiffs' Exhibit 23)

List	Returns	Excess	Total Tax
	Filed	Collections	
1040A Part Paid	5626	15	
1040A Full Paid	17271	09	
1040 Part Paid	284449	71	
1040 Full Paid	19702	83	
1041 Part Paid	91	70	
1041 Full Paid	3085	75	
1120 Part Paid	998173	20	
1120 Full Paid	13122	86	
Excess Profits Part Paid	10255	32	
Excess Profits Full Paid	1974	82	
All Others Part Paid	51612	35	
All Other Full Paid	70980	33	
		860	01
Totals reported by collector	1476346	11	860 01 1477206 12 * GL
Differences found by commissioner	+3,256.48		+ 3,256.48
Items reported by Commissioner			
Total Assessment	1,479,602.59	860.01	1,480,462.60

I Hereby Certify that I have made inquiries, determinations, and assessments of taxes, penalties, etc., of the above classification specified in these lists, and find that the amounts of taxes, penalties, etc., stated as corrected by the statement of differences and as specified in the supplementary pages of this list made by me are due from the individuals, firms, and corporations opposite whose names such amounts are placed, and that the amount chargeable to the collector is as above.

Dated at Washington, D. C.

Office of Commissioner of Internal Revenue, Nov 4 1938

Milton E Carter
Acting Commissioner of Internal Revenue
Instructions

(Plaintiffs' Exhibit 23)

This form must be made each month in quadruplicate by each tax division. The original and first copy must be forwarded with the duplicate copies of the monthly lists (Form 23A) to the Commissioner within ten days after the close of the month. The second copy must be submitted with the original and duplicate Form 820 to the Accounts and Collections Unit within five days after the close of the month. One copy of this certificate (Form 23C) will be returned to the collector accompanied by a statement of differences on Form 23D (if errors are found), and by additional sheets (Form 23A) containing items assessed additionally by the Commissioner. [181]

ASSESSMENT LIST.

Page No.

District 6th Calif, Income, List July 1938—Supple-
mental (Classification)

	Old				New	Re-
	Balance	Date	Debit	Credit	Balance	marks
1/1/38-6/30/38	1040-C	*	3245 92	3245 92	* Form 1040C	
Victorine Mertens	4Mrs				6/21/38	
Fernand Gravet/						6
10425 Wilshire Blvd	Westwood					
W. Los Angeles Calif	July 246					

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Pltf. Exhibit 23. Date 3/31/44. No. 23 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [182]

Mr. Zeitzius: I next offer a similar assessment, certified, signed by Commissioner of Internal Revenue, Guy T. Helvering, Washington, D. C., October 13, 1938, certifying to the Collector of Internal Revenue, or making, as I understand it, the assessments of the amounts that were paid on September 7, 1938, in the amounts shown on the two returns in evidence of \$17,423.88 for Mrs. Gravet and \$19,649.39 for Mr. Gravet. [220]

The Court: All right, it may be received.

The Clerk: 24 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 24, and was received in evidence.)

[PLAINTIFFS' EXHIBIT 24]

United States [Crest] of America
TREASURY DEPARTMENT
Washington

March 22, 1944.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed are true copies of Assessment Certificate of that portion of the September 1938 Supplemental Income Tax Assessment List—6th California collection district—showing assessments of \$17,423.88 for the period from January 1, 1938 to September 1, 1938 against Victorine Catherine Renourd Mertens (AKA—Mrs. Fernand Gravet) W. Los Angeles, California; \$19,649.39 for the period from January 1, 1938 to September 1, 1938 against Fernand Mertens (AKA—Fernand Gravet), W. Los Angeles, California, on file in this Department.

(Plaintiffs' Exhibit 24)

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[Seal]

F. A. Birgfeld,

F. A. Birgfeld,

Chief Clerk, Treasury Department. [183]

ASSESSMENT CERTIFICATE

[Stamped]: Internal Revenue. Received Oct 13 1938
By Proving Section

6th District of California Month September Year 1938
Income Tax Division

Lists as to tax and payments compared and found to agree with sectional control ledgers.

F. F. Fichthaler,

F. F. Fichthaler

Chief of Division

T. G. Albright,

Comptroller ~~Bookkeeper~~

I Hereby Certify that the individuals, firms, and corporations reported by me on the attached lists are liable for the amount of taxes, penalties, etc., entered opposite their names, and that the amounts thereof are as follows:

Dated at Los Angeles California

Office of Collector of Internal Revenue October 5th,
1938

Nat Rogan

Collector of Internal Revenue.

(Plaintiffs' Exhibit 24)

List	Returns Filed	Excess Collections	Total Tax
1040A Part Paid	6124 35		
1040A Full "	44938 05		
1040 Part "	27850 56		
1040 Full "	5398 91		
1041 Part "	286 23		
1041 Full "	177 52		
1120 Part "	1238529 24		
1120 Full "	23603 90		
Excess Profits Part "	243486 41		
" " Full "	16383 94		
All Others Part Paid	156265 85		
" " Full "	16283 94		
		25406 03	
Totals reported by collector	1763984 82	25406 03	1789390 85 * GL
Differences found by commissioner			
Items reported by commissioner			
Total Assessment	1,763,984.82	25,406.03	1,789,390.85

I Hereby Certify that I have made inquiries, determinations, and assessments of taxes, penalties, etc., of the above classification specified in these lists, and find that the amounts of taxes, penalties, etc., stated as corrected by the statement of differences and as specified in the supplementary pages of this list made by me are due from the individuals, firms, and corporations opposite whose names such amounts are placed, and that the amount chargeable to the collector is as above.

Dated at Washington, D. C.

Office of Commissioner of Internal Revenue Oct 17 1938

Guy J Hevering
Commissioner of Internal Revenue.

Instructions

This form must be made each month in quadruplicate by each tax division. The original and first copy must

(Plaintiffs' Exhibit 24)

be forwarded with the duplicate copies of the monthly lists (Form 23A) to the Commissioner within ten days after the close of the month. The second copy must be submitted with the original and duplicate Form 820 to the Accounts and Collections Unit within five days after the close of the month. One copy of this certificate (Form 23C) will be returned to the collector accompanied by a statement of differences on Form 23D (if errors are found), and by additional sheets (Form 23A) containing items assessed additionally by the Commissioner. [184]

ASSESSMENT LIST.

Page No.

District 6th Calif, Income, List September 1938—Supplemental

(Classification)

	Old Balance	Date	Debit	Credit	New Balance	Re- marks
1040-C-1-1-38						
to 9-1-38 *		9/7/38	17423 88	17423 88		* 1938-
Victorine Catherine						Amended
Renourd						July
Mertens/AKA-Mrs						246-1938
Fernand Gravet/						Form
10425 Wilshire Blvd						1040C
W Los Angeles Calif						9/7/38
Sept 260						0
1040-C-1-1-38-9-1-38 *			19649 39	19649 39		* 1938-
Fernand Mertens/						Form 1040C
AKA-Fernand						9/7/38
Gravet/						1
10425 Wilshire Blvd						
W Los Angeles Calif Sept 261						

[Endorsed]: Case No. 3002. Mertens v. Rogan. Pltf. Exhibit 24. Date 3/31/44 No. 24 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [185]

The Court: Anything further, gentlemen? You do not want any of those photostats of checks that he referred to, do you, Mr. Mitchell?

Mr. Mitchell: Oh, no, your Honor.

The Court: He is prepared, I notice. He was properly instructed. He has a photostatic copy of everything.

Mr. Mitchell: I do not know whether plaintiffs rest or not.

Mr. Zeitzius: Yes.

The Court: As soon as he is through with the witness he wants to step down.

Mr. Zeitzius: Plaintiffs rest. [221]

* * * * *

Mr. Zeitzius: That is right. May I, with permission of the Court, take certain of these exhibits and have copies made?

The Court: Make arrangements with the clerk. [222]

* * * * *

Los Angeles, California, Monday, April 3, 1944.
1:00 P. M. [224]

* * * * *

Mr. Mitchell: The defendant offers into evidence a certified copy of two telegrams. The certificate reads: "They are true copies of copy of Telegram dated March 17, 1944, to Collector of Internal Revenue, Baltimore, Maryland, from Cann, deputy;" deputy commissioner: and "Telegram dated March 17, 1944," the same date, "to Commissioner of Internal Revenue, Washington, D. C., from George Hofferbert, Collector, Baltimore, Maryland, in re: Fernand Mertens or Gravet, and Victorine

Catherine Renourd Mertens, Los Angeles, California" as plaintiffs' (defendant's) next exhibit in order.

Do you want to make an objection?

The Court: Defendant's you mean. [228]

* * * * *

Mr. Mitchell: Defendant's next exhibit in order.

Mr. Zeitzius: Our objection is not based on the ground that it is hearsay or not the best evidence. We waive that objection. But we object to it as being irrelevant and immaterial. It *is* does not pertain to the issues made by the pleadings in this case. [229]

* * * * *

The Court: Why don't you stipulate? The telegrams do not go to that extent. They merely say that there are no returns. Why don't you stipulate to the fact that no returns, like the first part of your stipulation—that no returns have been found? This merely shows that there are no such returns in the files, regardless of whether they have been filed or should have been filed.

Mr. Zeitzius: I can stipulate according to the telegrams, I think.

The Court: Then, why don't you let the telegrams speak for themselves? All they say is that there are no returns for those years. If you withdraw your objection, the telegrams speak for themselves and we do not have to determine whether they should have filed any or whether they received any income.

Mr. Zeitzius: Well, with that understanding, why, I am willing that the telegrams be permitted to speak for themselves.

The Court: All right. Then, the telegrams may be received as the government's next exhibit. [232]

The Clerk: G.

(The documents referred to were marked Defendant's Exhibit G, and received in evidence.)

[DEFENDANT'S EXHIBIT G]

TREASURY DEPARTMENT
BUREAU OF INTERNAL REVENUE
Washington

IT:REC:IW: BD: RHS 11:25A.M.
(Unit, Division and Section) (Time written)

Charge:

Treasury Department, Appropriation for
"Collecting the Internal Revenue"

[Written]: 383191

[Stamped]: Received in Mar 17 1944 Chief Counsel's
Office for the Bureau of Internal Revenue March 17,
1944 Civil

TELEGRAM

Official Business—Government Rates
COLLECTOR OF INTERNAL REVENUE
BALTIMORE MARYLAND
FORWARD AIR MAIL SPECIAL DELIVERY AT-
TENTION RECORDS IW BD INCOME RETURNS
FERNAND MERTENS OR GRAVET AND VIC-
TORINE CATHERINE RENOURD MERTENS TEN
FOUR TWO FIVE WILSHIRE BOULEVARD LOS
ANGELES CALENDAR YEARS THIRTY EIGHT
TO FORTY TWO INCLUSIVE IF FORWARDED

(Defendant's Exhibit G)

ADVISE SERIALS AND TRANSMITTAL DATES
URGENTLY NEEDED WIRE REPLY

CARR

DEPUTY [193]

TREASURY DEPARTMENT
BUREAU OF INTERNAL REVENUE

Telegraph Office

[Written]: Rec—IW BD 383191

[Stamped]: Received in Mar 18 1944 Chief Counsel's
Office for the Bureau of Internal Revenue
30W M WR156 30 COLLECT GOVT

BALTIMORE MD MAR 17 1944 533P
COMMISSIONER OF INTERNAL REVENUE
WASHINGTON DC

ATTENTION RECORDS IW:BD RETEL MARCH
17, 1944 RECORDS FAIL TO DISCLOSE RE-
TURNS FILED FERNAND MERTENS OR GRA-
VET AND VICTORINE CATHERINE RENOURD
MERTENS FOR YEARS THIRTY EIGHT TO
FORTY TWO

GEORGE HOFFERBERT COLLECTOR.
600P

[Written]: IT: Rec: IW: BD

[Stamped]: Received Mar 18 1944 Records Division

[Stamped]: Received Spec. Corres. Cont. Mar 18
1944 Bur. Int. Rev. No. 39092

[Endorsed]: Case No. 3002. Mertens vs. Rogan.
Defts. Exhibit G. Date 4/3/44. No. G in Evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. Louis
J. Somers, Deputy Clerk. [194]

Mr. Mitchell: Miss Olson, please. Miss Olson, take the stand.

MAY OLSON,

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: May Olson. [233]

* * * * *

Direct Examination

By Mr. Mitchell:

Q. Miss Olson, what is your occupation?

A. I am a clerk in the office of the Collector of Internal Revenue.

Q. Are you a qualified deputy collector?

A. Well, I am not a deputy collector, considered a deputy collector right now, since I have become certified under civil service.

Q. How long have you been a clerk in the office of the collector?

A. I have been in the office 19 years and some months.

Q. Have you recently made a search for the purpose of determining whether the records of the local collector's office indicate that any returns at all were filed by either Fernand Mertens or Fernand Gravet or by his wife, Victorine Catherine Renourd Mertens, covering a taxable period subsequent to December 31, 1938? Have you made such a search?

A. Yes; I have.

Q. Of the records? A. Yes.

Q. What records did you examine?

A. I examined all the records up to date, including 1942.

(Testimony of May Olson)

Q. Records of all returns filed? [234]

A. Of the card records of returns filed, yes; and assessments.

Q. Did you find any such record?

A. No; I did not.

Mr. Zeitzius: May I—

The Court: Just a moment.

Mr. Zeitzius: I did not get the question and answer as to what year.

The Court: Every year since 1938.

The Witness: Every year subsequent to 1938, including 1942.

* * * * *

The Court: Let me ask you this: You say you looked at the cards. Do you have a card index system? [235]

A. Yes.

Q. And an individual card for each taxpayer to correspond with the—

A. With the numbers on the returns.

The Court: With the numbers on the returns.

A. And for all assessments.

Q. From that card, if there is one; you can get the number and go to the return. The collector keeps the returns, too? A. Not all of them.

Q. Not all of them?

A. Some of them are in Washington.

Q. Some of them are in Washington?

A. But we do have card records of all returns filed.

The Court: I see; all right.

Q. By Mr. Mitchell: Have you also recently been asked to make a search and did you make a search, such

(Testimony of May Olson)

search, for the purpose of determining whether the records of your office show that either of the plaintiffs in this case, whose names I have just given to you, ever applied for an extension of time for filing returns for the year 1938?

Mr. Zeitzius: Objection. [236]

* * * * *

A. The records were searched. I did not search them myself.

The Court: Objection overruled.

A. Mr. Everson and someone from the income tax department searched them Saturday and found no record for any requests for extension.

Q. By Mr. Mitchell: Was that reported to you?

A. Yes.

Mr. Mitchell: Does counsel want me to bring the other witness down, or will you accept this witness' testimony? I admit that it is hearsay but it can be proven by the other witnesses. I hate to disturb them but I will do it unless counsel—

Mr. Zeitzius: I assume that the witnesses you would bring down would testify with respect to this office, Mr. Mitchell?

Mr. Mitchell: This office, yes; only this office.

Mr. Zeitzius: I see no need for you to bring them.

The Court: All right.

Mr. Mitchell: That is all, Miss Olson, unless counsel has some questions.

Mr. Zeitzius: Just one question.

(Testimony of May Olson)

Cross-Examination

By Mr. Zeitzius:

Q. How far back do you keep your records, Miss Olson?

A. Oh, they are kept, we have records back to, I think, 1920, 1919, card records. [237]

Q. When do you destroy them periodically?

A. They destroy the returns but never the card records.

Q. How recently have the returns been destroyed, that is, what is the latest year?

A. I couldn't say. Back three or four years, though. '37, I think, were destroyed. I am not sure.

Q. Any '38 returns been destroyed?

A. I don't think so. I couldn't say for sure, though. I could find out.

* * * * *

GEORGE W. GIVAN,

called as a witness on behalf of the defendant, after being first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: George W. Givan, G-i-v-a-n.

Direct Examination

By Mr. Mitchell:

Q. Mr. Givan, will you please state your occupation?

A. I am an internal revenue agent.

Q. Stationed in the Los Angeles office?

A. That is right. [238]

(Testimony of George W. Givan)

Q. How long have you been stationed in the office here?

A. Oh, about 22 years.

Q. I hand you, Mr. Givan, Plaintiffs' Exhibit 11—I thought I had it here. May I have Exhibit 11, Mr. Clerk, please?

* * * * *

Q. —and will call your attention to a letter that is contained in this group of letters, Plaintiffs' Exhibit 11, dated October 17, 1940, from Acting Internal Revenue Agent in Charge to Mr. Fernand Mertens and Mrs. Victorine Mertens. I call your attention to the last paragraph of that letter, reading: "The returns will be recommended for acceptance as filed and the claims will be recommended for disallowance." Are you familiar with that sentence? A. Yes.

Q. Is it used customarily in particular circumstances in the letters such as this from the revenue agent to the taxpayers in connection with refund claims?

Mr. Zeitzius: Objection unless it is shown that the purpose in which it is used is communicated to the plaintiffs or their representatives. And I think a proper foundation [239] has not been laid, therefore, for the question, and the letter speaks for itself. [240]

* * * * *

Mr. Mitchell: I will withdraw that question and ask that the record show that the original, which has been withdrawn, of Exhibit 11, a letter, the first letter, of November 8, 1940, the following phrase is mimeographed:

"I enclose a copy of the report of the examination of your income tax returns for the year," then the "1938" is typed in and the balance that follows is mimeographed.

(Testimony of George W. Givan)

Mr. Zeitzius: May I interrupt you? That is printed, Mr. Mitchell.

Mr. Mitchell: That is printed.

Mr. Zeitzius: The whole letter is printed except the address, the two years, the date, and the amount and the signature.

Mr. Mitchell: And the signature, very well.

The Court: All right.

Mr. Mitchell: And that same is true of the second letter, dated the same date, addressed to Mrs. Victorine Mertens; and the same is true of the letter of December 9, 1940, all of these letters being a portion of Plaintiffs' Exhibit 11.

That is all, Mr. Givan. [242]

J. R. WHITE,

called as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Mr. Mitchell: Mr. White has been sworn and is now called under Rule 43(b).

The Court: As an adverse witness.

Mr. Mitchell: As an adverse witness; yes, your Honor.
By Mr. Mitchell:

Q. Mr. White, did you ever on behalf of the plaintiffs apply for an extension of time for filing their income tax returns for the full calendar year 1938? [243]

* * * * *

(Testimony of J. R. White)

A. No; we did not.

Q. By Mr. Mitchell: Do you know whether Mr. Levi or Mr. Keesling did?

A. I do not know.

Q. By the Court: At the time you gave them the substitution of attorney, up to that time you had not asked any extension, had you?

A. No. I am sure that they did not file any.

Q. When did you file those substitutions? In 1940, wasn't it? A. In December, 1940.

Mr. Mitchell: In 1940. [244]

The Court: I thought it was 1940.

Q. By Mr. Mitchell: Mr. White, did you ever on behalf of either plaintiff file or cause to be filed federal income tax returns for any period subsequent to the year 1938? A. No. [245]

* * * * *

Q. By Mr. Mitchell: Now, Mr. White, did you ever inform or advise Loew's Incorporated on or about August 30, 1938, that Price-Waterhouse had prepared claims for refund for the additional tax required to be paid because of the determination of the collector's office?

A. Yes. And I find by refreshing my memory here that we originally prepared claims in August and that they were never completed and additional claims were prepared in May of 1939.

Q. These partially prepared returns of August, 1938, why were they not completed? I will withdraw that question. When did you contemplate filing those claims at the time you [246] were partially preparing them?

(Testimony of J. R. White)

Mr. Zeitzius: I object to that, your Honor, as to when he contemplated filing, as immaterial in the light of what instructions he may have received thereafter.

The Court: Overruled. This is cross examination in nature.

Mr. Zeitzius: All right.

The Court: Go ahead.

A. According to the letter we wrote to Loew's, we intended to have Mr. and Mrs. Mertens sign these claims and hold them for filing probably after the end of the year.

Q. By Mr. Mitchell: When, on March 15, 1939?

A. I would suppose that we would wait until after we had information from the Mertens as to the details of their income for the full year 1938, at which time we would—and what we actually did was to determine in the spring of 1939 whether they had additional income to be reported and owned additional tax for 1938, or whether they had a refund.

Q. For the full year, you mean?

A. For the full year; yes, sir, because we always regarded this as something—while you file interim returns when you departed, as Mrs. Mertens did twice, that her tax liability was not determined until the end of the year. And if they had additional income, for instance, if he had come back and acted in another picture or something like that, [247] then they would have had to file an additional return.

Q. For the full year?

A. For the full year 1938; yes, sir.

(Testimony of J. R. White)

Q. And then, that was the reason you did not get them immediately to verify the returns before they left?

A. That is right. We realized that if we had them verify the claims before they left that we would have to prepare new ones at the end of the year.

Q. Have you those claims with you, the partially prepared claims?

A. I do not have the partially prepared claims and I can't find them in my file.

Q. What period did those claims cover, the period up to September 14, 1938?

A. No; they would have covered the entire year.

Q. You say, "they would have"?

A. If they had been completed, they would have covered the entire year; yes, sir.

Q. Have you before you, Mr. White, the *subpoena duces tecum* that was served upon you in this case?

A. Yes, sir.

Q. I call your attention to Item 14—Item 4, rather, in it and will ask you to refresh your memory concerning the documents referred to.

A. Yes, sir.

Q. Are you able to produce any other letters or [248] written instruments described in Item 4 other than those that have been offered or introduced into evidence?

A. As I understand Item 4, this calls for all letters or written instruments addressed to me or to Price-Waterhouse by either Mr. or Mrs. Mertens.

Q. That is right; relating to—

A. The services rendered or to be rendered by him in the production of the photoplay and—

(Testimony of J. R. White)

Q. Relating to monies.

A. —monies received by either of plaintiffs from Loew's Incorporated. I would say that the only communication that I am aware of that we have ever received from Mr. Mertens is the communication of January 11, 1939.

Q. Which has been introduced into evidence as plaintiffs' exhibit—what is the number of that exhibit, please?

Mr. Zeitzius: Part of Exhibit 12, in answer to his letter of the 28th of December.

Mr. Mitchell: Oh, yes; it is Exhibit 12, letter of January 11. That is right.

Q. Calling your attention now to Item No. 5 in this subpoena: All original letters received by you or Price-Waterhouse from Loew's Incorporated subsequent to January, 1938, relating to the same subject. Have all of those letters been introduced into evidence, or have you others?

A. I have at least one other here. This refers to [249] services, compensation received or to be received by the plaintiffs.

Q. Wait a moment. Is this the enclosure?

A. No. Mr. Obinger was the Warner Bros. Picture man, and this is the letter which confirmed the withholding, or told us the amount of withholding by Warner Bros. of \$1,002. I don't recall that figure.

Q. Are there any others?

A. This is a letter from Loew's to us enclosing a letter from Noel Singer to Benjamin Thau enclosing a letter of January 11th from Fernand Gravet to Price-Waterhouse.

(Testimony of J. R. White)

Q. Has that letter been introduced into evidence, the one of January 11, 1939? A. That has.

Q. Where is the letter dated March 16, 1939?

A. I have the copy of such letter but I do not have the original.

Mr. Mitchell: Am I right?

Mr. Zeitzius: I don't know. I want to ask, Does counsel have something special in mind? This looks like a fishing expedition.

Mr. Mitchell: Frankly, this is a fishing. [250]

* * * * *

(Counsel and the witness conferring together while examining witness' file.) [252]

* * * * *

Mr. Mitchell: Mr. White, will you please produce an original letter from Loew's Incorporated to Price-Waterhouse of April 26, 1939, relating to the completed California income tax returns of the plaintiffs for the year 1938?

Let the record show that the witness has just handed me an original letter on the stationery of "Metro-Goldwyn-Mayer Pictures," dated April 26, 1939, addressed to Price-Waterhouse and Company—Re: FERNAND MERTENS (GRAVET) TAX MATTERS" and signed "LOEW'S INCORPORATED." We offer this letter into evidence as defendant's next exhibit. [260]

* * * * *

The Court: I will see that he does not get in anything that is too—that he does not misuse his inquisitorial powers. That is an awfully good phrase.

Mr. Mitchell: Exhibit H.

(The document referred to was marked Defendant's Exhibit H, and received in evidence.)

[DEFENDANT'S EXHIBIT H]

[Crest]

METRO-GOLDWYN-MAYER PICTURES

Culver City

California

April 26, 1939

[Stamped]: Attended to by JRW on 4/27/39 Answered by JRW on 4/27/39 Apr 27 1939 Passed by Partner W

[Written]: JRW

Price, Waterhouse and Company

530 West Sixth Street

Los Angeles, California

Attention: Mr. White

Re: FERNAND MERTENS (GRAVET)

TAX MATTERS

Gentlemen:

We reply to your letter of April 11, 1939 enclosing two copies of the tentative 1938 California income tax returns of Mr. and Mrs. Fernand Mertens.

The originals of the returns are returned herewith to be filed by you with the Franchise Tax Commissioner, Income Tax Division, Sacramento, California, as you hold Power of Attorney from Mr. and Mrs. Mertens and are therefore qualified to complete the affidavit on the returns.

(Defendant's Exhibit H)

Our check for \$978.49 in payment of one-third of the total tax of \$2,935.47 due on Fernand Mertens' return and check for \$1,007.85 in payment of one-third of the total tax of \$3,023.55 due on Mrs. Mertens' return are also enclosed.

We note that you have requested extension of time for filing these returns because Mr. and Mrs. Mertens are outside of the United States and completed returns are being sent to them for signature.

Yours very truly

LOEW'S INCORPORATED

By W. K. Craig

No Agreement or Order Will Be Binding on This
Corporation Unless in Writing and Signed by
an Officer

WKG

JJM:G

[Endorsed]: Case No. 3002. Mertens vs. Rogan et al.
Defts. Exhibit H. Date 4/3/44. No. H in Evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J.
Somers, Deputy Clerk. [195]

* * * * *

Q. By Mr. Mitchell: Mr. White, will you please produce your office copy of a letter from Price-Waterhouse to the plaintiffs, dated March 4, 1940? You are taking this off? A. That is not it.

(Testimony of J. R. White)

Q. You are taking this office copy of a letter from [262] the files of Price-Waterhouse and Co., Mr. White?

A. That is right; yes.

Mr. Mitchell: Defendant offers this as Defendant's next exhibit in order.

The Court: Have you seen it, Mr. Zeitzius?

Mr. Zeitzius: Yes. It merely transmits a claim of refund or, rather, advises the plaintiffs that it has been filed.

Mr. Mitchell: It indicates, your Honor, the fact that the plaintiffs' agent, attorney in fact, treated the refund claim as a refund claim and called it a refund claim. That is the only purpose of that.

The Court: All right.

The Clerk: Defendant's Exhibit I.

The Court: It may be received.

(The document referred to was marked Defendant's Exhibit I, and received in evidence.)

[DEFENDANT'S EXHIBIT I]

COPY - LOS ANGELES

March 4 1940

JRW:PC

Mr. Fernand Mertens,
Rue de Buzenvol,
St. Cloud (S. & O.),
France.

Dear Sir:

We have filed with the Collector of Internal Revenue at Los Angeles the claims for refund of 1938 Federal

(Defendant's Exhibit I)

income tax which you and Mrs. Mertens executed and forwarded to us in June 1939.

Yours very truly,
JRW

Copies to
New York ✓
San Francisco✓

[Endorsed]: Case No. 3002 Y. Civ. Mertens vs. Rogan, Defts. Exhibit I. Date 4/3/44. No. I in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [196]

* * * * * * * * *

Mr. Mitchell: Yes, your Honor. We offer into evidence as defendant's next exhibit a certified copy of a letter from Price-Waterhouse to the collector of internal revenue, Los Angeles, dated September 7, 1938, re Fernand Mertens and Victorine *Caterine* Renourd Mertens, and to which is attached data for determining income tax liability [263] of Mr. and Mrs. Mertens to date of departure of Mr. Mertens, September 14, 1938, being quite similar, as I was about to say, to the letter and data schedule attached to the refund claim of Fernand Mertens which was filed on that date.

Mr. Zeitzius: My only objection, your Honor, is that it is the same. It is already in evidence. It is the same letter and the same schedule that is already attached to Plaintiffs' Exhibit 5. It is identical to the letter.

* * * * * * * * *

Mr. Mitchell: That is offered chiefly, your Honor, because it is a much larger and clearer copy and can be more easily read without a magnifying glass.

* * * * * * * *

(Testimony of J. R. White)

The Court: Why don't you attach it, it being identical, and make it a part of the exhibit 5?

* * * * *

Mr. Zeitzius: This is 5. [264]

* * * * *

Mr. Zeitzius: They are both identical, your Honor. Page 3, your Honor, if you will look at page 3 of 5, schedule 5, you will find it starts the letter of September 7th, page 3. That is the same letter as in larger form here. The government photostated both of them.

The Court: Where is the misspelling?

Mr. Zeitzius: If you turn to the next page, it says "date" here instead of "data" I believe, if I am correct. Yes; it is "d-a-t-e" instead of "d-a-t-a."

The Witness: My copy was correct.

The Court: This may be attached as part of Exhibit 5.

Q. By Mr. Mitchell: Mr. White, I hand you Plaintiff's Exhibit 5 and call your attention to a page that here seems to be in the lower right-hand corner called "A-2" or "A-21," I don't know which.

(Counsel conferring privately.)

I call your attention to the item and the data for determining tax schedule, the item of gross income, reading: "1938 Federal income tax claimed by Collector of Internal Revenue to be 'constructively received' from Loew's Incorporated 40,017.41." I think you testified Friday regarding the method you used for determining that figure? [265] A. Yes, sir.

Q. Within one penny, I believe you said?

A. This is determined exactly.

(Testimony of J. R. White)

Q. That is an exact determination?

A. By an algebraic formula; yes.

Q. So that that amount, upon the collector's theory, is accurately determined—was accurately determined and that is the correct figure under the collector's theory and demand made at that time?

A. That is correct; yes.

Q. And the total tax computed on the last page, \$37,000—no. Well, the normal tax and the surtax for each of the parties was also accurately determined by you? A. That is right.

Q. And reported here also on the theory of the collector and the demand that the collector made at that time?

A. Yes. The \$20,669.80 for each spouse was the computation of the tax, and I believe that that was checked and is shown as the same amount and the computation on the forms that were filed. And, as to those computations, they were, of course, made in the collector's office, so we have the total check there; and the other figure, the only way we had of checking that was the self-proving of it. The pencilled figures on the bottom of that in my handwriting reconcile the amount of \$41,339.60 with the amount of \$40,017.41.

Q. Oh, yes. That total tax, then, is based upon the [266] total amount of the taxes that were paid for Mr. and Mrs. Mertens by Loew's Incorporated pursuant to the basis demanded by the collector, is that correct?

A. Yes.

The Court: They said so. They did not concede it. They say according to the claim of the collector.

(Testimony of J. R. White)

The Witness: That is right. In order for Mr. Mertens to get his sailing permit they had to pay \$37,073.27, the last figure you see there.

Q. By Mr. Mitchell: That was the balance unpaid?

A. That was the balance due. Now, you add to that the amount of \$3,245.92.

Q. Yes.

A. Which was paid at the time Mrs. Mertens got her sailing permit.

Q. By Loew's Incorporated?

A. By Loew's Incorporated, and that gives you a total of \$40,300 and some odd dollars.

Q. Which is the figure which appears in the gross income?

A. No, no. Then, included in that was approximately \$300 of taxes on the French income. The figure is on the bottom of the exhibit there. I do not have it in front of me.

The Court: Here it is right here. It is hardly visible. [267]

The Witness: The figure of 301 and, I believe it is 78 cents.

Mr. Mitchell: I see.

The Witness: That was the tax on the French income.

Q. By Mr. Mitchell: That was not included?

A. So that, in any event, that would be chargeable as a loan, no matter what happens, who was right in this case, and Mertens would have to pay the \$301. They would owe that out of their own pockets eventually, so that was taken off and that comes down in the answer of \$40,017.41.

Mr. Mitchell: I see. That clarifies that. I think that is all.

(Testimony of J. R. White)

Cross-Examination

By Mr. Zeitzius:

Q. Mr. White, if we eliminate from consideration the amount withheld by Warner Bros. of \$1,020.41, the amount of \$301.78 tax with respect to the French income shown in this schedule that we were just discussing, attached to Plaintiffs' Exhibit 5, what resultant tax would you have? Would you have the same tax as you have denominated \$40,017.41 up above in the income? Would they both be the same?

A. You get the same—no. You would have a tax of \$40,017.41 plus \$1,020.41, or \$41,037.82.

Q. I see. In other words, if we eliminate the French income alone, the tax on the French income, we would have [268] \$40,017.41 up above in the income part of the schedule as well as the tax result, is that it? That was the idea of—

A. No. You still would include the \$40,017.41 as gross income under this theory.

Q. Yes. And then the tax would be exactly the same if we eliminate the French income, is that true?

A. That is right.

Q. So that what—

Mr. Mitchell: You mean the gross income tax?

Mr. Zeitzius: Yes; the gross.

A. No. If you eliminate the French income from the return, then the tax will be \$301.78 less than this \$41,339.60 figure, or the tax will be \$41,037.82.

Q. Then if we eliminate the amount withheld by Warner Bros., which was already taken out to be paid, we would have the same amount down below as the tax lia-

(Testimony of J. R. White)

bility, as the amount which the collector requires you to include up above as income, isn't that correct?

A. No; that would not follow, because, if you eliminate the \$1,020.41 from income, that would only reduce the tax by about \$600. In other words, this \$1,020.41 was paid by Warner Bros. in 1938 in respect of the income that Gravet had earned from Warner Bros.

Q. I am afraid I probably did not make my point clear. My point was this: That the collector was demanding an amount of tax which the collector contends was due by Loew's [269] under the contract equal to the amount that was required to be included up above in income, namely, \$40,017.41, isn't that right?

A. That is right.

Q. When Mr. Mitchell asked you before about the amount paid by Loew's, what did you mean when you used the words "paid by Loew's" and you answered his question with respect to the June payment?

The Court: Why, it is evident all these amounts were paid by Loew's.

Mr. Zeitzius: All right. I withdraw the question.

Redirect Examination

By Mr. Mitchell:

Q. Mr. White—I almost overlooked it—has brought the original computation, a copy of his original notes and the original computation which was submitted to the collector about August 25th. Is that correct, Mr. White?

A. That is correct; yes, sir.

Q. And this is copied from your working papers?

A. This is a copy of the schedule that I took to the collector's office.

(Testimony of J. R. White)

Q. And which he rejected?

A. Yes. As a matter of fact, I left with the collector's office for a couple of days, and then they returned it back to me and told me what changes they wanted.
[270]

Mr. Mitchell: All right. We offer that in connection with the other computations which were introduced by the plaintiffs.

The Court: All right; it may be received.

The Clerk: Defendant's J.

(The document referred to was marked defendant's exhibit J, and received in evidence.)

[DEFENDANT'S EXHIBIT J]

Copy of Data Presented to Collector's Office
About August 25 1938

FERNAND MERTENS

(known professionally as Fernand Gravet)

VICTORINE CATHERINE RENOUD MERTENS

Data for Determining Income Tax Liability of Mr. and
Mrs. Mertens to Date of Departure of Mr. Mertens
September 14 1938

Income from profession:

Loew's Incorporated—

Salary	\$120,000.00
--------	--------------

1938 Federal old age bene- fits tax	30.00
--	-------

\$120,030.00

(Defendant's Exhibit J)

Warner Bros. Pictures, Inc.—

Salary	\$ 4,375.00	
1937 Federal income tax	4,592.06	
1938 Federal income tax	1,020.41	
1938 California income tax	88.08	
1938 California unemployment insurance tax	98.54	
1938 Federal old age benefits tax	30.00	
		<hr/>
		10,204.09
		<hr/>
		\$130,234.09

Less—Business expenses:

Commission paid agent	\$ 12,437.50
Wardrobe 50% of \$298.90	149.45
Books and records for research	18.28
Studio valet (salary \$479— expenses mostly meals \$102.40)	581.40
Gratuities to studio employees	119.28
Wigs, make-up supplies, etc.	69.32
Publicity	337.55
Telephone calls to France on business	1,170.50
Dental and skin treatments, including \$250 for special set of teeth for picture “The Great Waltz”	1,025.15
Dues—Screen Actors Guild	75.00

(Defendant's Exhibit J)

Automobile expenses:

Chauffeur's salary and meals	\$ 915.90
---------------------------------	-----------

Gas and oil \$188.66, Parking, etc. \$23.30	211.96
--	--------

Insurance—total for year commencing April 1938 \$102.71, one-half thereof	51.35
--	-------

Depreciation of Pack-
ard sedan at 25%
per anum—

Cost April 1938	\$1,800
--------------------	---------

=====

Depreciation for six months at 25%	225.00
---------------------------------------	--------

\$1,404.21

=====

Less—One-half thereof al- located to personal use	702.10
--	--------

16,685.53

\$113,548.56

Contribution:

Mount Sinai Hospital	\$ 10.00
----------------------	----------

Taxes:

Federal telephone	5.30
-------------------	------

(Defendant's Exhibit J)

California income	88.08
California unemployment insurance	98.54

 201.92

 Net income from sources within United States \$113,346.64

Income from other sources:

Rentals from flats in Paris—

Rentals for 1938	34,000 francs
Expenses for year	3,400 francs

 Net for year 30,600 francs

 Converted at \$.0273 (rate published in Wall Street Journal for August 18 1938) equals \$ 835.38

 For eight and one-half months ending September 15 1938 591.73

 Net income \$113,938.37

 [197]

	Mr. Mertens	Mrs. Mertens	Total
Net income, as above	\$56,954.19	\$56,954.18	\$113,908.37
Credit for personal exemption 8/12 of \$2,500	(833.34)	(833.33)	(1,666.67)

(Defendant's Exhibit J)

Credit for depend- ents 8/12 of \$800 (Mother age 73 and mother-in-law age 76)	(266.66)	(266.67)	(533.33)
--	----------	----------	----------

Amount subject to surtax	\$55,854.19	\$55,854.18	\$111,708.37
Earned income credit	1,400.00	1,400.00	2,800.00

Amount subject to normal tax	\$54,454.19	\$54,454.18	\$108,908.37
---------------------------------	-------------	-------------	--------------

Surtax	\$ 9,514.80	\$ 9,514.80	\$ 19,029.60
Normal tax	2,178.17	2,178.17	4,356.34

	\$11,692.97	\$11,692.97	\$ 23,385.94
--	-------------	-------------	--------------

Less:

Amount previously paid		(3,245.92)	(3,245.92)
---------------------------	--	------------	------------

Amount withheld at source by Warner Bros. Pictures, Inc.	(1,020.41)		(1,020.41)
---	------------	--	------------

Balance payable	\$10,672.56	\$ 8,447.05	\$ 19,119.61
-----------------	-------------	-------------	--------------

[Endorsed]: Case No. 3002. Mertens vs. Rogan.
Defts. Exhibit J. Date 4/3/44. No. J in Evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. Louis
J. Somers, Deputy Clerk. [198]

* * * * *

Mr. Mitchell: The defendant offers into evidence alien income tax return of Fernand Gravet and wife for the period beginning January 1, 1937, and ending January 31, 1937, which presumably is a joint return of both parties. That is a certified copy, certified by the Commissioner.

Mr. Zeitzius: I want to say this: That this return does not appear to me to be complete. They all require information on the backs, and unless counsel is prepared to show that there was not a back to this or another part or schedules, I would object to this as being incomplete, despite the certificate on here.

I want to say this: That I did see another return with [271] a certificate that I am personally satisfied is incomplete, and that is on that March return, Mr. Mitchell.

Aside from that, I would like to know the purpose for which it is offered. I see no relevancy or materiality. It is for another year preceding the taxable year, and can have no possible bearing thereon, especially if it is designed to establish their status as residents or non-residents. I would submit that a prior return could not establish that. * * * [272]

* * * * *

The Court: So I will overrule the objection and receive it in evidence.

Mr. Zeitzius: May I have Mr. Mitchell's assurance that the original did not have a second page?

Mr. Mitchell: I am sorry, I just don't know. All I know is what the Commissioner sent me.

The Court: Of course, there must be a second page.

Mr. Mitchell: There usually is.

The Court: You know, they have to give you the basis. Your first page is merely a summary of your second.

Mr. Zeitzius: That is right.

Mr. Mitchell: Is the page numbered there?

Mr. Zeitzius: There might be a question there on the second page.

The Court: There might not be anything on it. I don't know. It is all an incomplete return. [274]

* * * * *

The Clerk: This will be K.

(The document referred to was marked defendant's exhibit K, and received in evidence.)

Mr. Mitchell: We now offer nonresident alien income tax return of Victorine Mertens, only for the period beginning January 1, 1937, and ending November 30, 1937,

* * * * *

Mr. Zeitzius: I would say the same objection, and no doubt the Court will make the same ruling.

The Court: I will overrule it. It may have a bearing on it. Of course, there is evidence in the record showing that they had been here before.

Mr. Mitchell: That is right, your Honor.

The Court: On a visitor's permit, which is good only for six months.

Mr. Mitchell: That is right. [275]

The Court: It may be renewed for six months more.

Mr. Mitchell: That is right.

The Court: And thereafter they went back and came back as a quota number, so there would be no inconsistency owing to the fact of this return to secure a clearance

condition, they call it—"bailing out," as I call it. They bailed themselves out in 1937 for the purpose of doing it. In the past, you know, you could go to Mexico, the government allowed it to be done, and to Canada.

I will receive it in evidence.

(The document referred to was marked Defendant's Exhibit L, and received in evidence.)

Mr. Mitchell: In this Exhibit L which has just been introduced attention is called to the fact that up until November 30, 1937, or in fact, the date of sailing, December 26, 1937, Mrs. Mertens swore that she had no income whatsoever.

The Court: It may be received.

Mr. Mitchell: We now offer a certified copy of a non-resident alien income tax return for 1937, filed by Fernand Gravet, also known as Fernand Gravey, care of Sam Jaffe.

The Court: You forgot one important phrase here. It says "No Income. Visiting." (Defendant's Exhibit L.)

Mr. Mitchell: That is right, your Honor. Even though visiting, she would have to pay income on—[276]

The Court: No, no; that she had no income. She had no income because she was a visitor.

Mr. Mitchell: That is right.

* * * * *

Mr. Mitchell: For the whole year 1937, the certified copy of the return of the husband, the plaintiff in this case, not a departing alien return but a nonresident alien income tax return filed January 4, 1938.

* * * * *

The Court: I call your attention to this fact: that evidently they arrived separately, because Mrs. Gravet has stated that she arrived on September 30, 1937. That is in the 1937 income tax return.

Mr. Mitchell: That is the second return.

The Court: What?

Mr. Mitchell: She was here in January and then returned.

The Court: Date of arrival in the United States, September 30, 1937.

Mr. Zeitzius: That is right.

The Court: In the joint return.

Mr. Mitchell: For January. [277]

The Court: For January, which is signed by the husband, not by her, although he makes it for both—

Mr. Mitchell: That is right.

The Court: —he gave his date of arrival as October 27, 1936.

Mr. Mitchell: And date of departure?

The Court: Date of departure, January 16, 1937.

Mr. Mitchell: Yes, January 16, 1937. The sole purpose of this offer of the returns for 1937 is to establish a sworn statement that all of the earnings of Mr. Gravet in 1937 were owned exclusively by him and taxable only to him by both spouses.

Mr. Zeitzius: In that respect, I object to the introduction of the '37 return, and I call the Court's attention to the fact that it was sworn to before James F. McDonald, deputy collector, and, by comparison, you will see that it is the same James F. McDonald whose signature appears on the returns that are in evidence in this

case as the departing alien returns. And I do not feel that in determining whether or not the 1938 income is community it is competent to show what was done in 1937 under different conditions. [278]

* * * * *

The Court: * * * All right; objection overruled. That may be received.

The Clerk: M.

The Court: That will be M.

(The document referred to was marked Defendant's Exhibit M, and received in evidence.)

Mr. Mitchell: We also offer in evidence the income tax return of the plaintiff husband, nonresident alien income tax return for 1936, also verified by him, indicating that all the income reported was salaries and wages received from Warner Bros. Pictures, and one hundred per cent of which was reported solely by the husband.

Mr. Zeitzius: The same objection.

Mr. Mitchell: Individual separate return.

The Court: All right. It may be received.

The Clerk: Defendant's N.

(The document referred to was marked Defendant's Exhibit N, and received in evidence.)

Mr. Mitchell: Also, a certified copy of the claim for refund for \$213.29, income tax for 1936, filed not by both the spouses but by the husband alone. [279]

* * * * *

Mr. Zeitzius: The same objection as to the returns.

The Court: Overruled. It may be received.

The Clerk: O.

(The document referred to was marked Defendant's Exhibit O, and received in evidence.)

Mr. Mitchell: Also, the Commissioner's certified copy of the Bureau's certificate of over-assessment allowing the claim for refund as has just been introduced as Defendant's Exhibit O.

Mr. Zeitzius: The same objection, your Honor, as incompetent, irrelevant, and immaterial.

The Court: Overruled.

The Clerk: Defendant's Exhibit P.

(The document referred to was marked Defendant's Exhibit P, and received in evidence.) [280]

* * * * *

LEON LEVI,

called as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mitchell:

Q. Mr. Levi, you were with Loeb & Loeb until what date was it?

A. Until last December 31, 1943.

Q. Will you state what arrangement Loeb & Loeb had with Mr. Gravet, the plaintiff, for the payment of his fees in prosecuting this suit?

Mr. Zeitzius: May I have the question? Oh, I am sorry.

(Testimony of Leon Levi)

Q. By Mr. Mitchell: Did Loeb & Loeb have any arrangement with Gravet for the payment of its compensation for prosecuting this suit?

A. That question was never discussed with anyone, to the best of my knowledge.

Q. Never discussed with the plaintiff?

A. No.

Mr. Mitchell: That is all.

Mr. Zeitzius: I want to say this: I move to strike out the question and answer, your Honor, because I think there is a presumption that counsel appearing in a case—

The Court: In view of the negative answer you do not need that. There is a presumption that counsel have [281] authority.

Mr. Zeitzius: All right.

Mr. Mitchell: My question only was directed toward the question of the compensation.

The Court: Yes. There is also an affidavit which they attach to their power of attorney, Mr. Levi's power of attorney, which states that they had no arrangement for any contingent fees.

Mr. Zeitzius: That is right.

The Court: So any opprobrium applied to them is gone. All right, Mr. Mitchell.

* * * * *

GEORGE A. WARREN,

called as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

* * * * *

Mr. Mitchell: Mr. Warren is called also under Rule 43(b) as an adverse witness.

Mr. Zeitzius: At this point I want to let the record [282] show that Mr. Warren is not callable under Rule 43(b) or whatever it is, as a witness. Mr. Warren is not an agent.

The Court: He is merely an accountant for a firm. You can't call an employee. It has to be an executive officer. [283]

* * * * *

The Court: Oh, no. It must be the party. He is not Loew's Incorporated, he is not an officer. Are you an officer of Loew's?

The Witness: No, sir.

The Court: Do you own any stock in it?

The Witness: No, sir.

The Court: Do you get anything except your salary?

The Witness: Just my salary.

The Court: An occasional bonus?

The Witness: I would like even to get that, too.

The Court: Not even a bonus?

The Witness: Nothing but my salary.

The Court: All right. Go ahead, now.

(Testimony of George A. Warren)

Direct Examination

By Mr. Mitchell:

Q. Calling your attention to Defendant's Exhibit A—have you that, Mr. Clerk?—a letter dated September 8, 1938, from Loew's Incorporated to Mr. Gravet relating to the arrangement concerning the monies that were paid the day before to the Collector of Internal Revenue, I will ask you whether Loew's Incorporated have the plaintiff's reply to that letter? A. Yes; we do.

Q. Will you produce it, please?

A. (Witness producing paper.)

The Court: He even has the envelope. [288]

Q. By Mr. Mitchell: Have you the original and the envelope in which it was contained?

A. I believe this is it.

Mr. Mitchell: The witness hands me an envelope postmarked "United States" somewhere, "Special Delivery." On the envelope, "Fernand Gravet, Westwood Ambassador, Westwood, Los Angeles, California," the return address, special delivery and registered.

Q. Do you have a photostat of that for the Court to look at?

A. (Witness producing paper.)

Mr. Mitchell: I have never seen this before, your Honor. [289]

* * * * * * * *

Mr. Mitchell: This photostat will be all right.

(Testimony of George A. Warren)

The Court: That looks a good photostat.

Mr. Mitchell: We offer that as defendant's next exhibit.

The Court: Better than the Government's, I will say that much.

Mr. Mitchell: Yes; it is. It is larger.

The Court: It is larger, and evidently they are more used to taking them.

The Clerk: Defendant's Q.

The Court: You mark it, Mr. Somers, then I will look at it.

Mr. Mitchell: So it may be identified for the record, this is the letter dated September 13, 1938, an original letter to Mr. E. J. Mannix, Vice President, Loew's Incorporated, Culver City, California, filed "Received," or stamped [290] "Received September 14, 1938," and signed "Fernand Gravet."

Mr. Zeitzius: He has the name "Levi" up at the top above the stamp.

Mr. Mitchell: And the word "Levi" in longhand is in the upper right-hand corner. And there is another stamp.

The Court: "F. L. H. Sep. 14, 1938," something that looks like "J. H. I."—it is very incomplete—"Sep. 15. 1938."

Mr. Mitchell: Yes, your Honor.

(The document referred to was marked as Defendant's Exhibit Q. and was received in evidence.)

[DEFENDANT'S EXHIBIT Q]

September 13, 1938

Mr. E. J. Mannix, Vice President
Loew's Incorporated
Culver City, California

Dear Mr. Mannix:

I am in receipt of your letter of September 8, 1938, pertaining to the subject of taxes. The salient features of the income tax conditions of my contract as they have developed to date appear to me, somewhat not in accord with your letter, to be as follows:

The tax payment of \$40,319.19 made by you represents additional compensation paid to me for my services in connection with the motion picture production, "The Great Waltz". This money is not a loan and I will not be required to repay any refunds therefrom unless such refunds are actually received by me, nor will I be required to pay any additional taxes that may arise in connection with the related taxable income, but you will pay such additional taxes when determined to be payable.

You will appreciate the fact that I have not been concerned with the method in which you have handled the adjustments as to the allocation of tax burden between your firm and Warner Bros., and, since you have had the entire control of the situation, you will accept the adjustment already determined without the right to come to me at a future date and re-compute Warner Bros.' portion of the liability and ask me to stand the onus of

(Defendant's Exhibit Q)

negotiating with them at a time when my position will be such that I can not obtain a proper settlement. Moreover, I might mention that I have consistently justified this position because we have always regarded my operations as being under the original contract with Mervyn LeRoy, and any adjustments between the various studios would have to be worked out not by me but by the studios

It has always been our understanding that you would arrange the payment of compensation and taxes so that in the year 1938 there would be a taxable receipt of all monies that relate to my work in "The Great Waltz" and that, by the element of constructive receipt or by the filing of tax returns prior to the end of the calendar year 1938 and the payment of taxes thereon within the calendar year, we would establish the condition that all taxes paid on the basic income would be taxable in the year 1938 in such manner that there would be no carry-over into the year 1939. [215]

Mr. Mannix

Page 2

In connection with the contents of your letter of September 8, 1938, I trust that there is no purpose intended on your part to attempt to have the \$40,000.00 treated as a tax payable in the year 1939 and therefore not taxable as a constructive receipt in the year 1938, unless you reiterate in writing your intentions to defray the tax burden on that \$40,000.00 in such manner that my tax burden otherwise would not be increased in the

(Defendant's Exhibit Q)

year 1939 and thereafter. I understand that the Bureau of Internal Revenue has construed the payment of the \$40,000.00 tax to be taxable in the year 1938, and for all practicable purposes I feel that this should remain undisturbed unless I am indemnified properly against the invocation of any ideas that you have to the contrary.

I have been informed that in the year 1939 I will be required to file an income tax return with the State of California for the calendar year 1938 on which, for purposes of discussion, a tax will be payable roughly in the amount of \$10,000.00, based upon the amount of income reported to the Federal Government to date of my application for sailing permit. You are required by my contract to pay these taxes and defray them under the same arrangements for allocation of burden made with Warner Bros. as you recently did in the case of the Federal taxes. I also understand that the payment of these state taxes in 1939 will be construed as a taxable receipt in the year 1939 for Federal tax purposes, but, inasmuch as this taxable receipt will be offset by a deduction for the state income taxes paid, there will be no problem of a carry-over of taxable income in the year 1939 for Federal income tax purposes. However, since the payments of state income taxes are not deductible for state income tax purposes, there will be no offset to the additional taxable income in the State tax liability for the year 1939 on account of the payment of these state taxes. Therefore, you will be required to sustain the related state income taxes payable.

It is my desire to cooperate with you and minimize your tax cost, as I have consistently indicated. At the same time, I trust that you will bear in mind that I

(Defendant's Exhibit Q)

have been led to believe that anything that I agree to in these matters will not in any way create a tax burden upon me on other income beyond that which I would otherwise have to sustain. I believe it therefore advisable to state that anything to the contrary that may develop by technicality or by misstatement of understanding would be construed and corrected in the light of this fundamental concept as originally established in my agreement with Mervyn LeRoy.

Very truly yours,

Fernand Gravet
(Fernand Gravet)

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Defts. Exhibit Q. Date 4/3/44. No. Q in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [216]

Q. By Mr. Mitchell: Mr. Warren, have you your subpoena with you? A. Yes; I have.

* * * * *

Item 3. Have you any other original letters or other written instruments addressed to Loew's Incorporated or its agents or representatives by Fernand Mertens, or by his agents and representatives other than those that have already been offered or introduced into evidence?

A. I don't thing so, but I am trusting pretty much to memory as to what has been offered into evidence.

Q. Original letters from Mr. Gravet, or you might go [291] through your file there.

A. I will go through it and see what I can find.

(Testimony of George A. Warren)

The Court: I will return the original to you. I have read it.

The Witness: I believe that this has been offered. I am not sure (indicating file).

Mr. Mitchell: Is this in evidence, Mr. Zeitzius?

Mr. Zeitzius: No. I did not offer it because there was a ruling on the letter of the 30th of August. But maybe, if you want it in, I may not have any objection to it.

Mr. Mitchell: I have to look at it. Haven't we introduced the office copy of this?

Mr. Zeitzius: I think not. I marked on my copy "Not offered," because I took it up and considered it after the letter of August 30 was not received.

The Court: Are you finding anything?

Mr. Mitchell: There was one letter that we saw the office copy of.

The Witness: Consent to the assignment of the LeRoy contract (indicating).

Mr. Mitchell: I think we should complete this. Mr. Warren hands me an original letter addressed to Loew's Incorporated, dated Culver City, California, July 29th, 1938, signed by Mervyn LeRoy, purporting to be an assignment of LeRoy's contract to Loew's, then endorsed "Accepted: LOEW'S INCORPORATED by Benjamin Thau, Assistant Secretary," [292] and endorsed at the bottom is a consent to the assignment signed by "Fernand Gravet," subject to certain limitations there stated, and dated July 27th, 1938—it may be the 29th—consented to by Gravet probably July 29, 1938. We offer a photostatic copy of that letter in lieu of the original as Defendant's next exhibit.

The Clerk: Which will be R.

(The document referred to was marked Defendant's Exhibit R, for identification.)

[DEFENDANT'S EXHIBIT R]

7-29-38 C-W

Culver City, California

July 29th, 1938

Loew's Incorporated,
Culver City,
California.

Gentlemen:

This will confirm the following:

I hereby sell, assign, transfer and set over unto you all of my right, title and interest in and to the contract of employment between myself and Fernand Gravet dated May 6, 1936, as the same may have heretofore been amended and/or extended.

You hereby accept the above assignment; with the understanding, however, that you are assuming hereunder only such liability under said contract of May 6, 1936, as has arisen since April 15, 1938 and in connection with the photoplay now entitled "The Great Waltz".

If the foregoing meets with your approval please so indicate by your acceptance hereof in the space hereinbelow provided.

Yours very truly,

Mervyn LeRoy
(Mervyn LeRoy)

Accepted:

LOEW'S INCORPORATED

By Benjamin Thau

Assistant Secretary

(Defendant's Exhibit R)

I hereby consent to the above assignment and to the assumption of liability thereunder by Loew's Incorporated, limited as above specified, and in consideration of the acceptance of said assignment by Loew's Incorporated I hereby release and discharge Mervyn LeRoy of and from all liability whatsoever which he ever had or now has or hereafter may have to me arising out of or under or in any way connected with my contract of employment with him dated May 6, 1936, as the same may have heretofore been amended and/or extended, or arising out of any matter or thing relating thereto or arising out of any other matter or thing whatsoever; provided, however, that nothing herein contained shall be construed to release Mervyn LeRoy from his obligations with respect to the payment of taxes under the provisions of paragraphs 8 and 18 of said contract of May 6, 1936, as heretofore amended and/or extended.

Dated: July 29th, 1938.

Fernand Gravet
(Fernand Gravet)

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Defts. Exhibit R. Date 4/3/44. No. R in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [217]

The Court: That is the assignment of "E," is that correct?

Mr. Mitchell: The assignment of the LeRoy contract, if that is "E."

(Testimony of George A. Warren)

The Court: "E" is the Mervyn LeRoy contract.

Mr. Mitchell: That is right.

The Court: All right.

Q. By Mr. Mitchell: Do you find any others signed by Gravet?

A. Nothing signed by Gravet.

Q. Anything signed by Price-Waterhouse as agent?

A. Here is a Price-Waterhouse letter.

Mr. Mitchell: I am handed by the witness an original letter from Price-Waterhouse & Co., dated Los Angeles, July 27, 1938, addressed to Loew's Incorporated, attention Mr. Floyd Hendrickson, and the subject "FERNAND GRAVET," relating to taxes, 1938—39 taxes of Gravet, with a computation [293] attached thereto which accompanied the letter. I will offer into evidence the photostatic copy in lieu of the original. [294]

* * * * *

The Clerk: S.

(The document referred to was marked Defendant's Exhibit S, and was received in evidence.)

[DEFENDANT'S EXHIBIT S]

PRICE, WATERHOUSE & CO.

530 West Sixth Street

LOS ANGELES

July 27 1938

Loew's Incorporated,

10202 Washington Boulevard,

Culver City, California.

Attention: Mr. Floyd Hendrickson

Dear Sirs:

FERNAND GRAVET

As requested by Mr. Leon Levy, we enclose a statement showing the estimated 1938 income and taxes thereon of Mr. Gravet on the bases indicated by the statement. As arranged with Mr. Levy, in making these computations it has been assumed that both Federal and California income taxes would be paid during 1938. If payment of the California income tax is delayed until 1939 there may be a saving of from \$500 to \$2,000 of such tax. Also, if all or part of the Federal income tax can be paid or construed as having been paid in 1939, there should be a substantial saving in both Federal and California income taxes.

We shall be pleased to discuss this matter with you at your convenience.

Yours very truly,

Price, Waterhouse & Co.

Enclosure—

Statement

Copy to—

Messrs. Loeb & Loeb [218]

(Defendant's Exhibit S)

LOEW'S INCORPORATED

Estimated 1938 income and taxes thereon of Fernand Gravet under contract acquired by Loew's Incorporated at the salary payments indicated assuming (1) the income is community property income, (2) the Gravets are resident aliens and (3) the taxes are paid or constructively paid in 1938 and ignoring (1) credits for personal exemption, (2) earned income credits and (3) income and deductions from other sources.

	<u>Salary payments by Loew's Incorporated</u>					
	14 weeks at \$6,000	15 weeks at \$6,000	16 weeks at \$6,000	17 weeks at \$6,000	20 weeks at \$6,000	14 weeks at \$6,000 plus \$60,000
Income from salary:						
Warner Bros. Pictures, Inc.	\$ 10,204.09	\$ 10,204.09	\$ 10,204.09	\$ 10,204.09	\$ 10,204.09	\$ 10,204.09
Loew's Incorporated	84,000.00	90,000.00	96,000.00	102,000.00	120,000.00	144,000.00
	<u>\$ 94,204.09</u>	<u>\$100,204.09</u>	<u>\$106,204.09</u>	<u>\$112,204.09</u>	<u>\$130,204.09</u>	<u>\$154,204.09</u>
Deductions:						
Agent's commissions	\$ 8,837.50	\$ 9,437.50	\$ 10,037.50	\$ 10,637.50	\$ 12,437.50	\$ 14,837.50
California income and unemployment insurance taxes (1937) estimated to be included in income from Warner Bros. Pictures, Inc.	1,200.00	1,200.00	1,200.00	1,200.00	1,200.00	1,200.00
	<u>\$ 10,037.50</u>	<u>\$ 10,637.50</u>	<u>\$ 11,237.50</u>	<u>\$ 11,837.50</u>	<u>\$ 13,637.50</u>	<u>\$ 16,037.50</u>
Net income for 1938 before inclusion of Taxes based thereon	<u>\$ 84,166.59</u>	<u>\$ 89,566.59</u>	<u>\$ 94,966.59</u>	<u>\$100,366.59</u>	<u>\$116,566.59</u>	<u>\$138,166.59</u>
Estimated taxes thereon (included as income and deductions where applicable in computations):						
Federal income	\$ 21,352.78	\$ 24,384.22	\$ 27,836.68	\$ 31,830.60	\$ 47,432.50	\$ 78,159.18
California income	6,156.20	7,001.20	7,984.80	9,043.02	13,167.16	20,724.32
California unemployment insurance	1,128.64	1,222.34	1,321.70	1,427.28	1,790.16	2,395.06
Federal old age benefits	60.00	60.00	60.00	60.00	60.00	60.00
	<u>\$ 28,697.62</u>	<u>\$ 32,667.76</u>	<u>\$ 37,203.18</u>	<u>\$ 42,360.90</u>	<u>\$ 62,449.82</u>	<u>\$101,338.56</u>
Less taxes withheld by Warner Bros. Pictures, Inc. (1938):						
Federal income	\$ 1,020.41	\$ 1,020.41	\$ 1,020.41	\$ 1,020.41	\$ 1,020.41	\$ 1,020.41
California income	88.08	88.08	88.08	88.08	88.08	88.08
Federal old age benefits	30.00	30.00	30.00	30.00	30.00	30.00
California unemployment insurance	102.04	102.04	102.04	102.04	102.04	102.04
	<u>\$ 1,240.53</u>	<u>\$ 1,240.53</u>	<u>\$ 1,240.53</u>	<u>\$ 1,240.53</u>	<u>\$ 1,240.53</u>	<u>\$ 1,240.03</u>
Taxes to be borne by Loew's Incorporated	<u>\$ 27,457.09</u>	<u>\$ 31,427.23</u>	<u>\$ 35,962.65</u>	<u>\$ 41,120.37</u>	<u>\$ 61,209.29</u>	<u>\$100,098.03</u>
Total cost to Loew's Incorporated	<u>\$111,457.09</u>	<u>\$121,427.23</u>	<u>\$131,962.65</u>	<u>\$143,120.37</u>	<u>\$181,209.29</u>	<u>\$244,098.03</u>

[Endorsed]: Case No. 3002. Mertens vs Rogan Defts Exhibit S Date 4/3-44 No. S in Evidence Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk.

[219]

Mr. Mitchell: We offer another letter from Price-Waterhouse that has been handed to me by the witness, addressed to Loew's Incorporated and dated August 12, 1938, relating to the Fernand Gravet taxes, as defendant's next exhibit in order.

* * * * *

The Court: The objection is overruled. It may be received.

The Clerk: Defendant's Exhibit T. [295]

(The document referred to was marked Defendant's Exhibit T, and was received in evidence.)

[DEFENDANT'S EXHIBIT T]

PRICE, WATERHOUSE & CO.

530 West Sixth Street
LOS ANGELES

August 12 1938

Mr. Warren:

This corroborates recent memo to you on the subject of Fernand Gravet taxes.

JRW

Loew's Incorporated,
10202 Washington Boulevard,
Culver City, California.

Attention: Mr. John Melbourne

Dear Sirs:

FERNAND GRAVET

We have reviewed the copies of the revised agreements with Mr. Fernand Gravet loaned to us by Mr. Leon Levi

(Defendant's Exhibit T)

of Messrs. Loeb and Loeb. The revised agreements provide that Mr. Gravet is to receive a "basic compensation" of \$120,000 for his services in "The Great Waltz". Therefore in closing the cost accounts for the picture it seems reasonable to provide a reserve of approximately \$61,000 for taxes as estimated in the next to the last column of the schedule attached to our letter of July 27 1938. A copy of this schedule is enclosed so that it may be attached to the journal voucher.

Yours very truly,

Price, Waterhouse & Co.

Enclosure—

Schedule

Copy to—

Messrs. Loeb and Loeb [220]

(Defendant's Exhibit T)

LOEW'S INCORPORATED

Estimated 1938 income and taxes thereon of Fernand Gravet under contract acquired by Loew's Incorporated at the salary payments indicated assuming (1) the income is community property income, (2) the Gravets are resident aliens and (3) the taxes are paid or constructively paid in 1938 and ignoring (1) credits for personal exemptions (2) earned income credits and (3) income and deductions from other sources.

	Salary payments by Loew's Incorporated					
	14 weeks at \$6,000	15 weeks at \$6,000	16 weeks at \$6,000	17 weeks at \$6,000	20 weeks at \$6,000	14 weeks at plus \$60,000
Income from salary:						
Warner Bros. Pictures, Inc.	\$ 10,204.09	\$ 10,204.09	\$ 10,204.09	\$ 10,204.09	\$ 10,204.09	\$ 10,204.09
Loew's Incorporated	84,000.00	90,000.00	96,000.00	102,000.00	120,000.00	144,000.00
	<u>\$ 94,204.09</u>	<u>\$100,204.09</u>	<u>\$106,204.09</u>	<u>\$112,204.09</u>	<u>\$130,204.09</u>	<u>\$154,204.09</u>
Deductions:						
Agent's commissions	\$ 8,837.50	\$ 9,437.50	\$ 10,037.50	\$ 10,637.50	\$ 12,437.50	\$ 14,837.50
California income and unemployment insurance taxes (1937) estimated to be included in income from Warner Bros. Pictures, Inc.	1,200.00	1,200.00	1,200.00	1,200.00	1,200.00	1,200.00
	<u>\$ 10,037.50</u>	<u>\$ 10,637.50</u>	<u>\$ 11,237.50</u>	<u>\$ 11,837.50</u>	<u>\$ 13,637.50</u>	<u>\$ 16,037.50</u>
Net income for 1938 before inclusion of Taxes based thereon	<u>\$ 84,166.59</u>	<u>\$ 89,566.59</u>	<u>\$ 94,966.59</u>	<u>\$100,366.59</u>	<u>\$116,566.59</u>	<u>\$138,166.59</u>
Estimated taxes thereon (included as income and deductions where applicable in computations):						
Federal income	\$ 21,352.78	\$ 24,384.22	\$ 27,836.68	\$ 31,830.60	\$ 47,432.50	\$ 78,159.11
California income	6,156.20	7,001.20	7,984.80	9,043.02	13,167.16	20,724.31
California unemployment insurance	1,128.64	1,222.34	1,321.70	1,427.28	1,790.16	2,395.00
Federal old age benefits	60.00	60.00	60.00	60.00	60.00	60.00
	<u>\$ 28,697.62</u>	<u>\$ 32,667.76</u>	<u>\$ 37,203.18</u>	<u>\$ 42,360.90</u>	<u>\$ 62,449.82</u>	<u>\$101,338.52</u>
Less taxes withheld by Warner Bros. Pictures, Inc. (1938):						
Federal income	\$ 1,020.41	\$ 1,020.41	\$ 1,020.41	\$ 1,020.41	\$ 1,020.41	\$ 1,020.41
California income	88.08	88.08	88.08	88.08	88.08	88.08
Federal old age benefits	30.00	30.00	30.00	30.00	30.00	30.00
California unemployment insurance	102.04	102.04	102.04	102.04	102.04	102.04
	<u>\$ 1,240.53</u>	<u>\$ 1,240.53</u>	<u>\$ 1,240.53</u>	<u>\$ 1,240.53</u>	<u>\$ 1,240.53</u>	<u>\$ 1,240.53</u>
Taxes to be borne by Loew's Incorporated	<u>\$ 27,457.09</u>	<u>\$ 31,427.23</u>	<u>\$ 35,962.65</u>	<u>\$ 41,120.37</u>	<u>\$ 61,209.29</u>	<u>\$100,098.11</u>
Total cost to Loew's Incorporated	<u>\$111,457.09</u>	<u>\$121,427.23</u>	<u>\$131,962.65</u>	<u>\$143,120.37</u>	<u>\$181,209.29</u>	<u>\$244,098.11</u>

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Defs. Exhibit T. Date 4/3/44 No. T in Evidence. Clerk U. District Court, Sou. Dist. of Calif. L. J. Somers, Deputy Clerk.

(Testimony of George A. Warren)

* * * * *

The Witness: Here are some letters from Price-Waterhouse to Fernand Gravet.

Mr. Mitchell: Oh, just copies.

The Witness: Just copies. Here is an original.

Mr. Mitchell: Now, we have finished item 3 in the subpoena. The cancelled checks payable to the order of the plaintiff. I don't like to introduce all of them, but I would like the record show the period they cover and the number of checks during 1938.

Mr. Zeitzius: He has a complete set in anticipation that you might want to introduce them all.

The Witness: Here are photostats.

Q. By Mr. Mitchell: Mr. Warren, before offering these checks, can you testify from the checks whether any of them represent tax payments made by Loew's Incorporated on behalf of either plaintiff?

Mr. Zeitzius: I submit that the checks should be allowed to speak for themselves. They probably bear endorsements and I don't think the witness—

Mr. Mitchell: I will ask the witness to pick out those particular checks, if any [296]

The Court: Pick out the checks that represent tax payments during that year.

Mr. Mitchell: During 1938.

A. None of these checks represent tax payments.

Q. They all represent payments of salary or commissions owed by the plaintiffs to their business agent Schulburg?

A. I believe that is correct.

(Testimony of George A. Warren)

Q. I have never seen them, of course. Let us check them.

A. These are all listed here. I have the Schulburg checks listed down here with the voucher number, the check number, date of the check.

Mr. Mitchell: I am willing to accept this summary of the witness.

The Court: All right.

Mr. Mitchell: If he testifies it is correct.

Q. By the Court: You made it yourself?

A. I made it myself from the cancelled checks.

Q. By Mr. Mitchell: It reflects all of the checks which you now have before you?

A. All the checks.

Q. The amounts and the payee?

A. Yes. The payee is not very clearly stated. It is Gravet here, Schulburg here (indicating).

Q. The top computation is Gravet and the bottom one is Schulburg, the business agent? [297]

A. That is correct.

Mr. Mitchell: We offer this summary, then, as the next exhibit.

The Court: It may be received.

The Clerk: U.

(The document referred to was marked Defendant's Exhibit U, and was received in evidence.)

Mr. Zeitzius: Don't you want to add the checks, too?

Mr. Mitchell: That would encumber the record.

Mr. Zeitzius: It is understood none of the checks are payable to a collector of internal revenue.

The Court: No. This is the basic salary paid.

(Testimony of George A. Warren)

Mr. Mitchell: These are basic salaries.

The Court: The whole \$120,000.

Mr. Zeitzius: That is right. That is my understanding. They are either payable to Schulburg or Gravet.

The Court: That is right.

Q. By Mr. Mitchell: Have you any checks of Loew's Incorporated called for in item 5 of the subpoena, representing the approximate sum of \$40,017.41 evidencing the payment or advancement of that amount to the plaintiffs for federal income taxes?

The Court: He produced that. He said it was a bookkeeping entry, it was cash. Don't you remember they cashed his check, and they would only take the cash? And then he produced the ledger sheet to show how it was done. [298]

Mr. Mitchell: That is right.

The Court: Don't you remember that?

Mr. Mitchell: That is right. No checks were issued by Loew's to obtain that cash.

The Court: No. They gave him the \$40,000 cash.

The Witness: To obtain the cash we issued a check for \$40,000.

The Court: To obtain the cash?

The Witness: To obtain the cash.

Q. By Mr. Mitchell: Have you the cancelled check?

A. (Producing document.)

Q. Did you exhibit voucher M13-3 that is written in this check yesterday?

A. Last Friday.

Q. Or last Friday? A. Yes.

Q. Where is the number?

A. (Witness indicating.)

(Testimony of George A. Warren)

Mr. Mitchell: Oh, yes.

The Court: Here is the ledger sheet.

Mr. Mitchell: Yes; that is the ledger.

The Court: It is 22.

Mr. Mitchell: All right. I don't think there is any necessity of introducing that, unless counsel for plaintiffs wants to introduce it.

Mr. Zeitzius: I have no objection if you will introduce [299] it, if you care to, to complete your picture.

The Court: All right; let us take one copy, then. It is a short one, gentlemen, and it won't add much to the record. It is a tremendous record already. The voucher—what is this, a cashier's check? Yes.

Mr. Zeitzius: No. That is a cancelled check from Loew's Incorporated.

The Witness: It is a cancelled check of Loew's Incorporated payable to the Bank of America.

The Court: On which they got the cash?

The Witness: On which we got two cashier's checks to the amount of \$36,000 and \$4,000 in cash.

The Court: That is right. It shows on the back here 17,000, 19,000, and then 4,000.

Mr. Zeitzius: And then the note, your Honor, I would like to state at this time, also showed by White that they had cashed the cashier's checks.

The Court: Yes; I remember that. They would not take it, and they went down and brought the cash. They would not take any chances.

The Clerk: This will be Exhibit V.

(The document referred to was marked Defendant's Exhibit V, and was received in evidence.)

(Testimony of George A. Warren)

Q. By Mr. Mitchell: Mr. Warren, calling your attention to Defendant's Exhibit E—

May I have Defendant's Exhibit E? [300]

Mr. Zeitzius: Now Plaintiffs' Exhibit 20.

Mr. Mitchell: That is right; Plaintiffs' Exhibit 20. It is the LeRoy contract, paragraph 20. This is the LeRoy contract May 6, 1936.

Q. By Mr. Mitchell: Mr. Warren, calling your attention to paragraph 20, on page 9, starting out:

"Should any dispute or controversy arise between the parties hereto with reference to this contract or the employment herein provided for, such dispute or controversy shall be referred for determination to a committee consisting of five foundation members of the Actor's Branch of the Academy of Motion Picture Arts and Sciences," etc., and providing for an appeal to the Conciliation Committee of the same organization, I will ask you now whether the question of the proper amount owed by Loew's Incorporated to Mr. Gravet on account of his and his wife's 1938 federal income taxes—was that question of that amount ever submitted for arbitration to any five foundation members of the Actor's Branch of the Academy of Motion Picture Arts and Sciences?

Mr. Zeitzius: I haven't any objection to letting the truth be known, whatever it may be, but I want to call attention to the fact that, first of all, I think he should ask the witness if the witness knows whether any dispute with respect to taxes has ever been submitted to, or ask him in the form he wishes, any committee. [301]

The Court: I do not know how the witness would be in a position to state. He is not an executive. He is an accountant.

(Testimony of George A. Warren)

Mr. Mitchell: Well, this witness was subpoenaed at the request of the vice-president. I told him I did not want to inconvenience anyone, and he gave me the name of this witness.

The Court: All right. I will overrule the objection.

Mr. Zeitzius: My second point is this, your Honor: I call your attention to Plaintiffs' Exhibit 2 in evidence, which says in paragraph number 1, after referring to the payment of taxes in the United States on the compensation involved in "The Great Waltz": "The provisions of this paragraph"—

Mr. Mitchell: What paragraph?

Mr. Zeitzius: Paragraph numbered 1 of Plaintiffs' Exhibit 2. "The provisions of this paragraph 1 shall be in lieu and in stead of any and all provisions with respect to the payment of taxes contained in my contract of employment with Mervyn LeRoy dated May 6, 1936, as the same may have heretofore been amended and/or extended."

The Court: The effect of it may be there.

Mr. Zeitzius: So that this contract he is asking the witness about has been modified.

The Court: I will allow it to be gone into. Ultimately a man for whose benefit a contract is made has a right to [302] surrender a benefit. Overruled.

The question is: Was there any dispute between them referred to any committee, so far as you know, relating to taxes?

A. Not to my knowledge.

(Testimony of George A. Warren)

Q. By Mr. Mitchell: Was any suit or litigation between Loew's Incorporated and the two plaintiffs ever determined by any other court arising out of the employment of Mertens by Loew's Incorporated?

A. I would not be in a position to definitely answer that question. I would say, to the best of my knowledge, no.

Mr. Mitchell: Will counsel stipulate that that is the fact?

Mr. Zeitzius: I know of absolutely no dispute arising with respect to taxes, other than that you may argue and I will refute in connection with some letters that are in evidence. There has been no dispute whatsoever that I know of with respect to the terms of employment here, except between the government and the taxpayer.

The Court: All right.

Mr. Mitchell: And none has ever been adjudicated in any court or before any board of arbitration.

Mr. Zeitzius: I would say absolutely "Yes;" I know of no—haven't any knowledge that would even put me on notice to that effect. [303]

* * * * *

Mr. Mitchell: Defendant rests, unless he has forgotten something. I don't know that I have overlooked anything.

The Court: That is a reservation.

Mr. Zeitzius: I would like to put Mr. Levi on the stand.

The Court: All right, let us close the testimony.

LEON LEVI,

recalled as a witness by and on behalf of the Plaintiffs in rebuttal, having been previous duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Zeitzius:

Q. You have previously testified in the case, Mr. Levi?

A. Yes, sir.

Q. And you have been sworn.

What exhibit number is the letter of September 16, 1938, to Mr. Mannix, a defendant's exhibit.

The Clerk: 9-13-38. It is Defendant's Exhibit 2. [304]

Mr. Zeitzius: That is right.

Q. I hand you Defendant's Exhibit 2, the original of Defendant's Exhibit 2, with a letter attached and envelope, and ask you if you ever saw that before?

A. Well, I am not sure that I ever saw this original. I think I did. But I have seen a copy of it.

Q. Do you recall when you saw the copy, approximately?

A. Yes. I first saw the copy on September 14th, 1938, the day after the letter is dated.

Q. Will you state whether you did anything upon receiving the copy of this exhibit 2?

A. Yes.

Q. Please state who you saw and what you did?

A. Well, it is my recollection that on September 14th Loew's Incorporated sent me by special messenger a copy of this letter as soon as they received it. And I think that the first thing that I did after that was to contact Mr. Singer by telephone and I had quite an argument

(Testimony of Leon Levi)

and discussion with him over the telephone. My reason for calling him was that on reading this letter it was quite apparent to me that it had been written by Mr. Singer—

Mr. Mitchell: I move that that answer, a portion of the answer, be stricken as a conclusion.

The Court: That may go out.

A. So I called—

Q. By Mr. Zeitzius: Did Mr. Singer admit writing the [305] letter?

A. Mr. Singer did admit—Mr. Singer told me that he wrote the letter. And I told him that I was quite upset by it; that it was completely out of accordance with the facts; that it did not at all represent the agreement that I had made on behalf of Loew's Incorporated with Mr. Gravet.

Mr. Mitchell: Just a moment before you go on with that conversation. I would like to know where it took place and who Mr. Singer was.

A. The conversation took place, I have already said, over the telephone. I was in my office and Mr. Singer was in his office. Mr. Singer was an accountant who was employed by Mrs. Schulburg who, I think the evidence shows, was Mr. Gravet's agent.

Mr. Mitchell: I see.

A. Mr. Singer—I had had quite an argument and unpleasant discussion, series of dealings with Mr. Singer just prior to that in connection with another case where he became involved. It was a different studio.

The Court: Let us get down to this one, Mr. Levi.

A. Well, I just point out that because I want to say that we had a lot of unpleasant discussion about this

(Testimony of Leon Levi)

letter, too, which finally ended up with my telling Mr. Singer that I was going to talk to Mr. Gravet about it and secure his repudiation of the letter. I think it was the next day that I met with Mr. Gravet. It may have been — [306]

Mr. Mitchell: Now, just a moment, just a moment. Mr. Gravet, under his return, was to sail on the Normandie on September 14 and you received this letter September 15, is that correct?

A. No. I believe I received this letter September 14th, and it is my recollection that Mr. Gravet was still here at that time.

The Court: All right; go ahead.

Q. By Mr. Zeitzius: Did you see him after you got that letter or a copy of it?

A. It is my recollection, yes, that I had another meeting with him after I received this letter. I am quite certain that is the case. I don't know exactly on what day he left Los Angeles, but I am very certain that I discussed this letter with him after it was received at the studio.

Q. Where did your discussion occur with him?

A. I believe at the studio. In fact, that is my recollection, that I made an appointment to meet him at the studio and went out there to talk to him about it, and at that time I told him that this letter was completely out of accordance with the facts, with the conversations that we had previously had and with the letter that I had written to him.

And I explained to him that the money had already been advanced by Loew's Incorporated; that at the time it was advanced it was with the understanding that it was

(Testimony of Leon Levi)

to be [307] treated as a loan, and that I could not understand why he would now permit Mr. Singer to put him in a position where he was writing a letter repudiating that agreement after the money had been paid with that understanding. And the upshot of the conversation was that the letter was completely repudiated by Mr. Gravet to me.

He told me that he had not understood it; that it had been dictated by Mr. Singer; that he did not understand the implication of it and wanted us to ignore it. And why this letter was still in the file of Loew's Incorporated I can't tell you, because the letter should have been destroyed at that time.

Q. Do you recall anything else that was said by Mr. Gravet in repudiation of the letter?

A. No; just that the arrangement that had been made and the understanding that he had had in his conversations with Mr. White and myself would continue in force.

Q. Are you familiar with Government's Exhibit A, a letter dated September 8, 1938, to which Mr. Gravet's letter appears to be a reply, the one that you just discussed under Exhibit 2?

A. Yes. I testified as to this letter the other day and stated that I had dictated it.

Q. Did the subject of this letter come up in this conversation?

A. The subject of that letter and of the conversation [308] that Mr. Gravet had had with Mr. White on the day of obtaining his sailing clearance and the conversation that I had had with him a day or two before he went down to the Collector's Office, because at all three of those times it had been said and understood by both Mr. Gravet and us that the money was to be treated as a loan.

(Testimony of Leon Levi)

Mr. Mitchell: I move the word "understood" be stricken as a conclusion.

The Court: Well, that may go out. I think you have already testified to the import of those conversations.

Q. By Mr. Zeitzius: Since your conversation of about September 14th with Mr. Gravet did anything occur at any time subsequent thereto in which Mr. Gravet took a position contrary, again, one way or another?

A. Nothing occurred in which Mr. Gravet took the position contrary. Mr. Singer came into the picture, as I recall it, once several months later, when Mr. Gravet sent some papers back to this country from France, sent them to Singer to be forwarded to Price-Waterhouse, and Mr. Singer, as I recall it, forwarded them with a letter in which he demanded or suggested certain commitments. But that, again, was ignored, because Mr. Singer, as far as either Mr. White or myself knew—Mr. Singer had no place, no proper place in this whole proceeding.

Q. So far as you know, he has never been employed with respect to 1938 or the contract of employment involved [309] in this suit?

A. So far as I know, he has never been employed by Gravet. He was employed by Mrs. Schulburg, but not in connection with 1938 taxes of Gravet.

The Court: Any further questions?

Mr. Zeitzius: No further questions.

The Court: All right, Mr. Mitchell.

Cross-Examination

By Mr. Mitchell:

Q. You mean, Mr. Levi, that the signature on this letter is not Mr. Gravet's signature?

(Testimony of Leon Levi)

The Court: No. Mr. Gravet admitted that that was his signature. Looks like the same signature.

Mr. Mitchell: It does to me.

The Court: He said it was dictated by him. He did not say it was signed.

Mr. Mitchell: Will counsel for the plaintiffs stipulate that the stamp in the upper right hand corner of this letter of September 13, Defendant's Exhibit 2, the one dated September 14, stamped, is "F. L. H." and that it indicates that it was received on September 14, 1938, by—what is the name, Mr. Warren?

Mr. Warren: F. L. Hendrickson.

Mr. Mitchell: —F. L. Hendrickson, vice-president of Loew's Incorporated.

Mr. Warren: No. He is in charge of the legal department. [310]

* * * * *

Los Angeles, California, Tuesday, April 4, 1944.
2:00 P. M.

The Court: All right, gentlemen, let us proceed.

* * * * *

Mr. Mitchell: I find one little matter that I overlooked, and would request that we re-open for that matter only. It is with regard to our notice to produce which was served upon counsel sometime before the trial. And we will ask plaintiffs' counsel now whether there are any documents in the custody of plaintiffs' counsel or plaintiffs, described in the notice to produce, which are available and which have not either been produced here, offered into evidence or in evidence?

Mr. Zeitzius: My best recollection is there are not. I went carefully through my file after getting your notice and I found that all the documents were in the possession of either Price-Waterhouse or Loew's. We had copies. And I want to congratulate you on having dug up everything that possibly could be brought forth.

Mr. Mitchell: Very well. I wanted the record to be complete on that point before defendant rested. Now defendant rests.

[Endorsed]: Filed Nov. 21, 1944. [313]

[Endorsed]: Filed Nov. 24, 1944. Paul P. O'Brien, Clerk.

[Endorsed]: No. 10933. United States Circuit Court of Appeals for the Ninth Circuit. Ethel Strickland Rogan, as executrix of the Last Will and Testament of Nat Rogan, deceased, Appellant, vs. Fernand Mertens, also known as Fernand Gravet and Victorine Catherine Renourd Mertens, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed November 24, 1944.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10933

ETHEL STRICKLAND ROGAN, Executrix of the Last
Will and Testament of NAT ROGAN, Deceased,
Appellant,

v.

FERNAND MERTENS, also known as FERNAND
GRAVET and VICTORINE RANOURD MER-
TENS,
Appellees.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

On appeal from the judgment in the above-entitled ac-
tion, the appellant will urge and rely upon the following
points, to wit:

The District Court erred:—

1. In holding that the amount of appellees' 1938 in-
come tax paid by appellee-husband's employer in June and
September of such year did not constitute then taxable
income of appellees.

2. In holding that the amount of such income tax
paid by the appellee-husband's employer constituted a
loan to the husband.

3. In holding that the amount of such tax payments
did not constitute realized income in the taxable period
when such taxes were due and payable.

4. In that Findings 12 and 14 and Conclusion 4 are
not supported by substantial evidence.

5. In that Conclusions 3, 4, 5, 6 and 7 are contrary to the law, and are not supported by the Findings or by substantial evidence.

6. In the alternative, (a) in impliedly holding that the appellee-husband became contractually and unconditionally obligated to pay to his employer any amount certain by virtue of such tax payments, (b) in impliedly holding that the appellee-husband's liability, if any, to pay all or any part of such monies to his employer was not contingent, (c) in impliedly holding that such taxes were not so paid by the employer under a "claim of right" made by appellee-husband and (d) in impliedly holding that the appellees did not have the use, enjoyment and benefits of such tax payments at the time they were made.

7. In the alternative in holding that the complaint states a claim upon which relief can be legally granted the appellee-wife, and in ordering a judgment in favor of the appellee-wife.

8. In that the findings do not support the judgment.

9. In that the evidence does not support the findings.

Dated: November 15, 1944.

CHARLES H. CARR

United States Attorney

E. H. MITCHELL

Assistant United States Attorney

By E. H. Mitchell

Attorneys for Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 24, 1944. Paul P. O'Brien,
Clerk.